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No. ____

IN THE
Supreme Court of the United States

_____ TERM, 1984

EUGENE R. SUTTON, *et al.*, *Petitioners*,
v.
WEIRTON STEEL DIVISION of National Steel Corporation
and
INDEPENDENT STEELWORKERS UNION
and
PENSION AGREEMENT BETWEEN
NATIONAL STEEL CORPORATION and
INDEPENDENT STEELWORKERS UNION, *Respondents*.

EDWARD DHAYER, *et al.*, *Petitioners*,
v.
WEIRTON STEEL DIVISION of National Steel Corporation
and
INDEPENDENT STEELWORKERS UNION, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN RANDOLPH SPON, JR.
Counsel of Record
KEITH A. FOURNIER
SPON & FOURNIER
Suite 904-911
AmeriTrust Bank Building
Steubenville, OH 43952
(614) 282-3600
Counsel for Petitioners
Eugene R. Sutton, *et al.*, and
Petitioners Edward Dhayer, *et al.*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED FOR REVIEW

Was the granting of Summary Judgment and Final Judgment erroneous under the totality of circumstances of this case, involving the largest Employee Stock Option Purchase in the history of the United States, wherein National Steel Corporation, as employer and plan fiduciary, demanded 11th hour amendments to the pension plan as essential consideration for the sale of its own property, for reason that National Steel Corporation violated the strict fiduciary standards imposed pursuant to Sections 404 and 406 of the Employees Retirement Income and Security Act of 1974?

PARTIES APPEARING BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners *Eugene R. Sutton, et al.*, were Appellants before the United States Court of Appeals for the Fourth Circuit in *Case Nos. 83-1567* and *83-2002*. Said Petitioners were the Plaintiffs in the United States District Court for the Northern District of West Virginia, Wheeling, West Virginia, in *Civil Action No. 83-0035-W*. They were hourly employees of Respondent National Steel Corporation.

Petitioners *Edward Dhayer, et al.*, were Appellants before the United States Court of Appeals for the Fourth Circuit in *Case No. 83-2004*. Said Petitioners were the Plaintiffs in the United States District Court for the Northern District of West Virginia, Wheeling, West Virginia, in *Civil Action No. 83-0036-W*. They were salaried employees of Respondent National Steel Corporation.

Respondent *Weirton Steel Division of National Steel Corporation*, also referred to as National Steel Corporation, was an Appellee before the United States Court of Appeals for the Fourth Circuit and was a Defendant in the United States District Court for the Northern District of West Virginia in the cases mentioned above.

Respondent *Independent Steelworkers Union* was an Appellee before the United States Court of Appeals for the Fourth Circuit and was a Defendant in the United States District Court for the Northern District of West Virginia in all cases mentioned above.

Respondent *Pension Agreement Between the National Steel Corporation* and the *Independent Steelworkers Union* was an Appellee in the *Sutton* action in the United States District Court for the Northern District of West Virginia, mentioned above.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, *Eugene R. Sutton*, and all companion petitioners with him, and *Edward Dhayer*, and all companion petitioners with him, respectfully pray that a Writ of Certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Fourth Circuit entered in the above-captioned matters, bearing Case Nos. 83-1567 and 83-2003; and 83-2004, on December 30, 1983.

OPINIONS BELOW

The Opinions of the United States Court of Appeals for the Fourth Circuit in Case Nos. 83-1567 and 83-2003, and 83-2004, are contained in the Appendix at pages 1a to 12a.

The Opinions of the United States District Court for the Northern District of West Virginia in Case Nos. 83-0035-W are contained in the Appendix at pages 13a — 52a.

The Opinions of the United States District Court for the Northern District of West Virginia in Case No. 83-0036-W are contained in the Appendix at pages 53a — 84a.

STATEMENT OF JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

- Sec. 1254. Courts of Appeals; Certiorari; appeals; certified questions.
- Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

  (1) By writ of certiorari granted upon the petition of any party to any civil action or criminal case before or after rendition of judgment or decree;

STATUTORY PROVISIONS INVOLVED

Sec. 404. (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan:

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5)).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's, or beneficiary's exercise of control.

PROHIBITED TRANSACTIONS

Sec. 406 (a) Except as provided in section 408:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a).

(2)No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property violates section 407(a).

(b) A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

STATEMENT OF THE CASE

The issues which arise from these cases involve the largest Employee Stock Option Purchase (ESOP) in the history of the United States.

On the date these original actions were filed National Steel Corporation owned and operated a facility known as the Weirton Steel Division. Suffering the fate that is endemic in the domestic steel industry in recent times, the Weirton Steel Division became unprofitable and the work force steadily declined. In view of the projected continued decline of the steel industry and the fact that approximately $1 Billion Dollars in capital improvements over the next ten years would be required to modernize the facility to competitive levels, National Steel Corporation decided to divest itself of the Weirton facility.

However, under a retirement program, known as "Plan 001" and administered by National Steel, such a divestiture would result in increased pension benefits to approximately 3,000 employees, in addition to extensive severance liabilities under collective bargaining agreements and managerial personnel policies. The total of such increased pensions and severance liabilities would approximate $123 million.

The orchestration of this divestiture commenced on March 2, 1982, with the coercion of a threatened loss of jobs, when National Steel Corporation announced its intention to sell the Weirton Steel Division or reduce it to a finishing mill. This action would have resulted in permanent loss of jobs for 85 per cent of the existing employees. National also announced its intention to immediately commence discussions with the Inde-

pendent Steelworkers Union, the Independent Guards Union, and managerial employees of the Weirton Steel Division, for the purpose of arranging an employee purchase of the Weirton facility. On the same day, officials of the Independent Steelworkers Union met with managerial employees of the Weirton Steel Division to initiate discussions concerning the employee buy-out desired by National Steel Corporation and the collective bargaining agreement which contained provisions relating to retirement rights and benefits, and severance benefits for affected hourly employees, including the Plaintiffs in the *Sutton* action. The salaried employees, including the Plaintiffs in the *Dhayer* action, were also participants in "Plan 001," and were promised similar severance and pension benefits under National Steel's managerial personnel policies.

Among the benefits offered by National Steel were increased retirement benefits designated as "Increased Pension - Rule of 65" and "Increased Pension - 70/80" benefits, which had been extended to the employees for several years as an inducement to remain in the employ of National Steel. While one interpretation of these benefit provisions renders the benefits as conditional, the express language, nevertheless, established that the essence of the triggering condition giving rise to the benefits was simply the termination of the employer-employee relationship between National Steel and the employee.

Specifically, the pension agreement[1] stated, in pertinent part, that an employee, who is otherwise eligible, is entitled to an increased "Rule of 65" pension if his . . . service is broken by reason of a layoff . . . or

> *. . . whose service is not broken and who is absent from work by reason of . . . a layoff and whose return to active employment is declared unlikely by the Company . . . and*
>
> *. . . who has not been offered suitable long-term employment . . .*

[1] The "Pension agreement" referred to throughout this petition has, due to its length, been filed with this Honorable Court in a separate lodging.

Further, the Summary Plan Description, prepared by National Steel Corporation, clearly stated, with reference to "Rule of 65" benefits, that an otherwise eligible employee will receive such benefits when

> *he has not been offered suitable long-term employment with the Company.*

Similarly, the pension agreement stated, in pertinent part, that an employee who is otherwise eligible, is entitled to an increased "70/80" pension if his

> *. . . service is broken by reason of a permanent shutdown of a plant, department or subdivision thereof or by reason of a layoff . . . or*
>
> *. . . whose service is not broken and who is absent from work because of . . . a layoff and whose return to active employment is declared unlikely by the company . . .*

Under the terms of "Plan 001," employees who retire under the "Rule 65" or "70/80" retirement provisions would receive their regular pensions, plus an additional $4 Hundred per month increase.

Likewise, severance benefits under the collective bargaining agreement were conditioned, essentially, upon the termination of the employer-employee relationship between National Steel Corporation and the employee. The collective bargaining agreement[2] between National Steel and the Independent Steelworkers Union stated, in pertinent part:

> *When in the sole judgment of the Company, it decides to close permanently a department or discontinue permanently a substantial portion thereof and terminate the employment of individuals, an employee whose employment is terminated either directly or indirectly as a result thereof shall be entitled to severance allowance. . . .*

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[2] The Collective Bargaining agreement referred to throughout this petition has, due to its length, been filed with Honorable Court in a separate lodging.

The Summary Plan Description, required by the Employee Retirement Income Security Act of 1974, identified National Steel Corporation as the administrator and trustee of the plan.

> *. . . [National] is the plan administrator, trustee and agent for service of legal process under the plan. . . . The plan administrator has the responsibility to manage the plan and act in the interest of the plan participants and must carry out its duties in accordance with the fiduciary standards of ERISA.*

Despite the fact that National Steel Corporation was the plan fiduciary, it continued to implement and orchestrate its intent to deprive plan participants of the "Rule 65" and "70/80" benefits provided for in the pension plan. The means to implement National Steel's twin objective of unloading its own unprofitable asset, the Weirton facility, and avoiding and abating the promised benefits attendant to such a divestiture, was to "negotiate with itself" under a ruse of collective bargaining. The vehicle by which this would be accomplished was the creation of a joint committee comprised of National Steel managerial employees and union representatives, to form what later became known as the Weirton Joint Study Committee. The managerial employees on the Committee were under the day-to-day supervision of National Steel Corporation.

The Joint Study Committee commissioned the consulting firm of McKinsey & Company to determine whether the Weirton Steel Division could survive as an independent company. On July 26, 1982, McKinsey and Company submitted a report which concluded that survival was possible. However, the report makes repeated reference to the risky nature of the venture.

After the feasibility study was received, the Joint Study Committee hired the actuarial firm of Towers, Perrin, Forster & Crosby (hereinafter referred to as TPF&C) to examine certain pension matters. The TPF&C report[3] set forth Nation-

[3] The TPF&C report referred to throughout this petition has, due to its length, been filed with Honorable Court in a separate lodging.

al Steel Corporation's liability were it required to pay shutdown benefits:

> *The actuarial present value on a Pre-Shutdown basis is $452.8 million. This figure is significant as a starting value, since it approximates the measurement of plan obligations as National currently measures itself. On a Plant Shutdown basis (Weirton operations only), the actuarial present value increases from $452.8 million to $770.6 million. In other words, if National had shut down Weirton on January 1, 1982, the total worth of the benefits would have been $770.6 million. Of the $317.8 million increase ($770.6 - $452.8 = $317.8), $123.2 million represents the worth of the $400 per month temporary supplements.*

The affidavit of TPF&C Actuary, David Kass, submitted in opposition to the Motion for Summary Judgment, refers to this unfunded shutdown liability as a plan asset.[4]

The TPF&C report further noted that National Steel Corporation's desire to avoid that additional liability of over $300 Million was a material consideration in establishing the purchase price of the Weirton facility:

> *The employees of the Weirton Division of National Steel Corporation are considering purchasing the Weirton Division from National. Unfunded pension obligations are a factor in determining a purchase price.*

The conclusion reached by the TPF&C report was confirmed by the testimony of Carl Valdiserri. He testified as follows:

> *Now, during the period of time that the negotiations are going on, this for the establishment of the price, was there also consideration being given to the liabilities or to the pension fund liabilities?*
>
> *A. Absolutely.*

Accordingly, the purchase price ultimately established was $66 Million, though the book value of the assets of the Weirton

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[4] The affadavit of David Kass is a part of the record below and is found in the appendix 120a-122a.

Division was $300 Million. The difference reflects consideration given by National in exchange for the avoidance by National of shutdown retirement benefits.

The negotiations concerning the price and other terms of sale with National Steel was undertaken by the Joint Study Committee, which had assured employees that it would negotiate with National Steel to find a way to create an independent Weirton without compromising their pensions. However, it soon became apparent that a condition of sale imposed by National Steel Corporation was an agreement to forego the supplemental retirement benefits provided in the pension plan and relied upon by older workers.

At the hearing on preliminary injunction, uncontroverted evidence established that over 3,000 Weirton Division employees were eligible for "Rule of 65" and "70/80" benefits and that the liability of National Steel for these benefits was a "grave concern" to the Company. At the same hearing, evidence further established that the General Counsel of National Steel's Weirton Division stated that National Steel would not agree to a sale if the Company would be required to pay shutdown benefits to employees of the newly created Weirton Steel Company. This was confirmed by the testimony of Joseph Robbins, a salaried employee at the Weirton Steel Division. Robbins stated that the Weirton General Counsel advised the salaried employees that the sale was conditioned on an agreement to forego shutdown pension benefits. Notes taken by employee Robbins at a meeting of salaried employees state, in pertinent part:

> *Bill [Doepken, General Counsel of the Weirton Steel Division] said that they would not complete a deal if they were liable for these plans. National is demanding a contract change to take the plant shutdown liability off their hands. The contract would have to be amended before a sale.*

Thus, the record is clear that, as a condition of sale, National insisted that the employees forego the "70/80" and "Rule of 65" retirement benefits promised in the retirement plan adopted

and administered by National. There was no evidence in the record of the extent to which the Joint Study Committee resisted National's insistence that employees forego the shutdown retirement benefits. Nor was there an opportunity to develop any record with respect to the efforts, if any, made by the union to protect the negotiated rights of its members. What is clear in this abbreviated record is that the Joint Study Committee and the union acquiesced in and accepted National Steel's terms with respect to the shutdown retirement provisions.

The Agreement in Principle,[5] reached between National Steel Corporation and the Joint Study Committee, specified that the sale of the Weirton facility would not give rise to either "70/80" or "Rule of 65" retirement benefits. Under the agreement, National's shutdown liability would be limited to paying supplemental shutdown payments, but not severance pay, in the event of "a shutdown of Weirton of substantially all of its facilities; in effect, that Weirton shall cease to exist within five years from the closing date." The agreement also contained the following provisions:

> *National will neither reimburse Weirton nor pay Weirton Division employees a severance allowance in connection with a closing or shutdown occurring on or after the closing date.*
>
> *All union contracts with National will be amended to provide that they be read in conjunction with the agreement between the parties, and to the extent such contracts are inconsistent with such agreement, they will be amended. National will amend Plan 001 to provide that the sale of the Weirton Division assets does not constitute a shutdown and will amend its severance plans and policies for nonrepresented employees to provide that the sale of the Weirton Division assets will not entitle such persons to severance payments.*

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[5] The Agreement in Principle and ammendment thereto has been filed in a separate lodging with this Honorable Court.

The Agreement, therefore, permits National Steel to divest itself of the Weirton facility without incurring "Rule of 65" and "70/80" retirement liability or the obligation to pay severance benefits.

On this limited record, the District Court granted partial Summary Judgments in favor of National Steel, its Retirement Program, and the Independent Steelworkers Union. Finding no just reason for delay, it entered Final Judgment, pursuant to Federal Rule of Civil Procedure 54(b), on the issues that it had considered.

The companion case, styled *Brunner, et al.* v. *National Steel, et al.*, was consolidated with the Sutton and Dhayer cases in the Lower Court and concerns similar issues. A separate writ of certiorari has been filed in that matter.

Appeal was made to the Fourth Circuit Court of Appeals, which heard the matter on consolidation of all cases herein. On December 30, 1983, the Fourth Circuit Court of Appeals affirmed the judgments of the District Court, holding inter alia, that:

1. No genuine issue of fact remained in dispute, save one which the district court accepted as proved.
2. ERISA does not impose any fiduciary obligations to maintain allegedly contingent benefits.
3. The accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance pay.
4. The ERISA Act was not designed to prohibit modification of ancillary benefits.
5. The means, manner, mode, and timing of any 11th hour amendments are not to be reviewed by fiduciary standards.
6. National Steel Corporation did not transfer assets of the plan to a party-in-interest, deal with plan assets for their own account, or act in any capacity in a transaction involving the plan on behalf of a party whose interests are adverse to the plan, and plain-

tiffs actuary's affidavit opinion was not proof that National Steel's contingent liability was an asset of the plan within the meaning of ERISA.

7. National Steel Corporation has not caused the benefit plan to engage in a transaction with respect to the contingent benefits.

8. The evidence conclusively established that the Independent Steelworkers Union did not breach its duty of fair representation.

9. The District Court committed only harmless error by granting summary judgment to the Independent Steelworkers Union without a pending motion under "Rule 56" and without affording plaintiffs the notice and protection afforded by Rules 12(b)(6) and 56.

10. The District Court committed only harmless error by denying plaintiffs further discovery.

REASONS FOR ALLOWANCE OF THE WRIT

I. Section 404 Of The Employees Retirement Income And Security Act Imposes Fiduciary Obligations And Restrictions Which Are Intended To Protect Participants And Beneficiaries And Prohibit Plan Fiduciaries From Self-Dealing. The Fourth Circuit By Failing To Extend Those Fiduciary Obligations To This Transaction Erred As A Matter Of Law.

The compelling reasons for allowance of this writ for review commence with the obvious ramifications of the precedent established by this case involving the largest Employee Stock Option Purchase (ESOP) in the history of the United States. Never before has this High Court been presented with these unique first impression issues involving the duties and parameters of fiduciary conduct in an employee purchase conditioned upon the fiduciary's demanded 11th hour amendments to a pension plan as essential consideration to the sale of its own depleted facility.

The Fourth Circuit stated that issue succinctly in its opinion:

> *The critical question, therefore, is whether ERISA imposes any fiduciary obligations to maintain the con-*

tingent benefits about which the appellants complain. If it does, summary judgment was inappropriate, because in avoiding the payments through sale of the Division, National's self-motivation, which the district court assumed for the purpose of this proceeding, cannot be reconciled with its fiduciary duties.

However, the Court went on to narrowly define the reach of fiduciary protection, and thus left undaunted the Northern District's sanction of National Steel's tainted behavior, as a matter of law, and without affording petitioners any reasonable discovery in order to prove their assertions.

Section 404 of the Employee Retirement and Income Security Act, 29 U.S.C. Section 1101 et seq., (hereinafter referred to as "ERISA"), specifically states, in pertinent part:

Sec. 404(a)(1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries . . .

In the instant case, the Fourth Circuit held that, as a matter of law, it was not empowered to scrutinize National Steel Corporation's conduct within the above fiduciary mandate because:

The Act was not designed to prohibit modification of these ancillary benefits.

and,

An employer may change such benefits without violating ERISA.

for reason that National Steel Corporation has the right

to renegotiate or amend . . . unfunded contingent benefits.

The Court Buttressed its ruling, primarily, upon *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982). Petitioners submit that the Fourth Circuit was in error for the following reasons:

First, by implication, the *Robinson* Court stated that fiduciary review *may* be held if the collective bargaining process itself is tainted to the extent that it violates any command of Congress. In the instant case, National Steel Corporation negotiated an ESOP agreement. The alleged negotiations occurred between the National Steel Corporation and the Weirton Joint Study Committee, which Committee was at all times therein comprised, in part, of high-ranking National Steel executive officers. Under such circumstances, the alleged "collective bargaining" did not possess traditional elements of confidentiality and arms-length negotiations.

Second, the alleged "collective bargaining" that occurred did not primarily concern itself with the traditional benefits of employment, but was concerned with the sale of the fiduciary's own property, which sale was conditioned upon 11th hour amendments to the pension plan.

Petitioners submit that the District Court's granting of a summary judgment, while precluding discovery into the collective bargaining process itself under such suspect circumstances, contravenes the salutary objectives of ERISA.[6] As so aptly stated by one Court:

> *ERISA should be given a broad construction in order to carry out its purposes of protecting the interest of plan participants and beneficiaries . . .*" *Eaves* v. *Penn*, 587 F. 2d 453 (10th Cir. 1978).

Collective bargaining, under the unique circumstances of this case, implicates fiduciary standards imposed by Section 404 of ERISA for reason that the demanded amendments significantly affected the plan participants' imminent shut down benefits. These benefits became imminent by the acts of the fiduciary itself, when it announced its intent to terminate 85 percent of the existing jobs. Rather than guard the participants' imminent contingent benefits, it acted solely in its own interest by

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[6] "The standard laid down for District Courts in passing on motions for summary judgment is strict." *Clarke v. Montgomery Ward & Company*, 298 F. 2d 346, 348 (4th Cir. 1962). See, also *Phoenix Savings & Loan, Inc.* v. *Aetna Casualty & Surety Co.*, 381 F. 2d 245 (4th Cir. 1967); *Adickes* v. *S.H. Kress & Company*, 398 U.S. 144 (1970).

demanding approval of amendments deleting those benefits from a majority of the bargaining unit employees. This majority was not eligible for "Rule 65" or "70/80" benefits. However, the petitioners, who constituted a minority of the bargaining unit, the older workers, had no choice in the matter.

Thirdly, the petitioners represented in the *Dhayer* case, were not a part of the bargaining unit. Accordingly, their only protection was reliance on National's status as a fiduciary in its relationship to their rights and benefits. That reliance was sorely misplaced.

Amendments under certain circumstances have given rise to judicial intervention under fiduciary standards in similarly inequitable circumstances. In *Calhoun* v. *Fallstaff Brewing Corp.*, 478 F. Supp. 257 (Mo. 1979), Opinion After Trial Sub. Nom. *Dependahl* v. *Fallstaff Brewing Corp.*, 491 F. Supp. 1188 (Mo. 1980), Modified On Other Grounds, 653 F. 2d 1208 (8th Cir. 1981), Cert. Den. 454 U.S. 968 (1981), an employer sought to require an amendment which would discontinue severance benefits that otherwise would have been payable. The Court denied the employer defendant's motion for summary judgment and gave the plaintiffs the opportunity to prove their allegations that such an action constituted a breach of fiduciary duty. The *Calhoun* Court stated:

> *. . . an amendment of the plan as alleged by plaintiff clearly violates its fiduciary duty. The fiduciaries are to guard the interests of the participants and beneficiaries, not those of the employer . . . to argue that the employer may terminate such plans at any time without violating the statute is clearly not supportable in the statutory language nor in equity.* 478 F. Supp. at 361.

The Amendment to "Plan 001" covering the Petitioners and those similarly situated suffers the same vice as that condemned in *Calhoun*. The demanded 11th hour modification of this pension agreement by the fiduciary for the sole purpose of withdrawing a benefit which was imminent absent such an amendment must give rise to fiduciary violations. To not apply

the standard set forth by Congress in Section 1104 to this unique and novel sequence of events would violate the clear remedial intention of the Act.[7]

The Fourth Circuit reasoning suffers several additional flaws.

First, salaried employees, including the *Dhayer* petitioners, were not even represented for collective bargaining purposes and, with regard to these employees, National Steel, in its status as administrator, simply unilaterally amended this plan in order to deprive employees of these long-term entitlements. There was no negotiation, choice, nor bargaining involved. The older unionized employees, represented in the *Sutton* case, had little choice in "bargaining" over these benefits.

This High Court in *National Labor Relations Board* v. *AMAX Coal Company*, 453 U.S. 322 (1981) explains the critical distinction between the conduct of a fiduciary and parties engaged in collective bargaining:

> *"the atmosphere in which employee benefit trust funds fiduciaries must operate, as mandated by Section 302(c)(5) and ERISA is wholly inconsistent with this process of compromise and economic pressure." 453 U.S. at 336.*

Here National Steel engaged in clear and unrelenting economic pressure arguably accepted in the collective bargaining context but which should be wholly inappropriate in any trust setting. The hallowed words of Justice Cardozo cry out for application in the context presented here, a trustee *must* be held to a higher standard than the "morals of the marketplace." *Mienhard* v. *Salmon*, 163 N.E. 545, 564 (Ct. of App. N.Y. 1928).

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[7] A violation of Sec. 404 can *only* be discovered by careful analysis of relevant facts. This was *not* done here. *Donovan* v. *Bierwirth*, 680 F. 2d 263 (2nd Cir. (1982), *Flinchbaugh* v. *Chicago Pneumatic Tool Co.*, 531 F. Supp. 110 (Pa. 1982). Summary Judgment precluded developing the record herein to develop this essential factual analysis.

National's bargaining with Petitioner's interests, in their early retirement benefits and long term employment entitlements states a classic case of breach of trust. It would state a cause of action even if the common law concepts of fiduciary duty and conflict of interest had not been specifically written into the ERISA statute. For example, in the case of *Roberts* v. *Sears, Roebuck & Co.* 573 F. 2d 976 (7th Cir. 1978), which involved a company's overreaching in negotiating with a former employee for rights to his invention, the court observed that factors giving rise to a relationship of trust include "disparity of age, education and business experience between the parties," as well as "the existence of an employment relationship and the exchange of confidential information from one party to the other." Also crucial was the fact that the employer expected the employee to rely on various representations made to him. 573 F. 2d at 983. Similar factors and a similar reliance existed here.

That an employer continues to act as fiduciary of its employees' pension plan, while engaged in a transaction affecting their interests, is an additional factor which brings the specific provisions of ERISA into play in this instance.

Second, the Fourth Circuit erroneously reasons that ". . . *if ERISA does not impose an obligation on National to maintain the contingent benefits, National in its capacity as an employer could undertake to eliminate them.*" Nothing in the Act can be read as limiting fiduciary standards to vested benefits or relegating shutdown retirement benefits to some lesser standards of fiduciary duty. The issue presented in this case is *not* whether National Steel Corporation would have been prohibited from modifying these "ancillary benefits," but, rather how it went about this modification, namely, by demanding at the 11th hour that, unless these benefits were amended out of the plan, they would simply not sell the steel mill.[8] The result would have been the loss of jobs for all employees.

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[8] The 4th Cir. Court's summary dismissal of Sec. 404 implications was based solely on *Fentron Industries, Inc.* v. *National Shopman Pension Fund*, 674 F. 2d 1300 (9th Cir. 1982). Contrary to the reasoning of the 4th

The determination of when the generic fiduciary obligations of ERISA are implicated is admittedly a difficult task dependent on factual shadings and particular circumstances of the action under review. The Northern District Court, by its refusal to allow discovery, and the Fourth Circuit's affirmation of the lower court's decision precluded the type of record necessary to fairly address and resolve the issue in a monumental case of first impression.

Never before has our society been confronted with the rapid transition from an industrial to a technological age, with its resultant decline of industrial jobs and abandonment of old industrial facilities. These sociological factors will precipitate continued efforts by major corporations to unload unprofitable facilities to desparate workers through ESOPs. While ESOPs were originally intended to provide protection to industrial workers, this case represents an ominous sign that ESOPs may now be utilitized as a weapon against the older workers, in particular.

In reaching its conclusion that Section 404 of the Employees Retirement and Income Security Act was not violated in this instance, the Fourth Circuit failed to consider the totality of circumstances within which these amendments were exacted. This High Court in its *AMAX* opinion explained:

> "*. . . a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. Restatement (Second of Trusts Section 170(1) (1957); 2 A Scott, Law of Trusts Section 170 (1967). To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.' Meinhard* v. *Salmon, 249 NY 458, 464, 164 NE 545, 546 (Cardozo C.J.) A fiduciary cannot contend 'that, although he had con-*

Cir., that opinion does *not* hold that modifying ancillary benefits *never* violates or implicates Sec. 404. Rather, it holds that such amendments are not "per se" violations. It is important to note that that decision was sent back on Remand for a closer factual review by the District Court to ascertain whether a breach of fiduciary obligations resulted. That is precisely what your petitioners herein request.

> *flicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.' Woods* v. *City National Bank & Trust Co., 312 US 262, 269, 85 L Ed 820, 61 S Ct. 493." 453 U.S. at 329, 330.*

Referring to Section 404, the Court in *Eaves* v. *Penn*, Supra, noted that the ". . . provisions embody a carefully tailored law of trusts, including the familiar requirement of undivided loyalty to beneficiaries. . . ." 585 F. 2d at 457. Here, National Steel, though employer, administrator, fiduciary, and offeror of the Weirton Division, acted to deprive beneficiaries of long-term retirement benefits that would have otherwise been payable. The Company acted solely in its own interest and to the clear detriment of the plan participants. Neither the reasoning nor the authority cited by the Court justifies this departure from the Act. Accordingly, petitioners respectfully request that this Writ for review be granted.

II. The Fourth Circuit Court Erred In Affirming The Lower Court's Failure To Find A Violation Of Section 1106 Of ERISA In This Transaction.

In addition to the generic standards governing fiduciary obligations, codified at 29 U.S.C. Section 1104, Congress also specifically proscribed certain conduct by plan fiduciaries. In *McDougal* v. *Donovan*, 552 F. Sup. 1206 (IL 1982), the Court observed:

> *Rather than leaving all fiduciary transactions to be judged by the general Section 1104 standard, Congress also enacted Section 1106, which prohibited fiduciaries from causing the plan to engage in certain specified transactions. These prohibitions evidence Congressional desire to prevent transactions that offer a high potential for loss of plan assets or for insider abuse. Marshall* v. *Kelly*, 465 F. Sup. 341, 354, (W.D. Okla., 1979)." 552 F. Sup. at 1214, 1215.

"Party-in-interest" is defined in 29 U.S.C. Section 1002(14) and under the definition National is clearly a party in interest since it is both a fiduciary and an employer of employees

covered by a benefit plan. This High Court further reiterated the Congressional intent behind Section 1106 by stating in its *AMAX* decision:

> *The legislative history of ERISA confirms that Congress intended in particular to prevent trustees 'from engaging in actions where there would be a conflict of interest with the fund, such as representing any party dealing with the fund.' S Rep No. 93-383, pp. 31, 32 (1973). In short, the fiduciary provisions of ERISA were designated to prevent a trustee 'from being put into a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries.'* H.R. Conf. Rep No. 93-1280, *supra*, at 309." 453 U.S. at 333, 334.

Here, National Steel announced that it would divest itself of the Weirton facility, thereby triggering shutdown retirement benefits. National then engineered a transaction for the purpose of relieving itself of such liability. National caused the plan to relinquish an asset in the form of payments required to be made to the plan for distribution to plan participants. Contrary to the explicit command of Section 1106, it acted in a transaction affecting the plan in a manner adverse to the plan beneficiaries. Perhaps even more incredible is that in so doing, it benefitted itself as employer, while breaching its obligations as fiduciary. The afidavit of the actuary, David Kass,[9] is not all the Petitioners submitted in support of their argument. However, having been precluded from discovery, they were unable to develop a full record. The Fourth Circuit Court noted that a prudent fiduciary might consider National's contingent liability but stated that "the actuary's opinion is not proof that National's contingent liability is an asset of the plan within the meaning of ERISA." The argument is circuitous in that further proof was not allowed because the Petitioners were precluded from developing a record. Yet, again, based on a sparse and undeveloped record, the Appellate Court summarily stated:

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[9] Filed with this Court in the Appendix at 120a-122a.

National has not caused the benefit plan to engage in a transaction with respect to the contingent benefits.

This is simply not the case. The plan was required to forfeit, in order to accommodate the interest of National Steel Corporation as employer, the sum of $300 Million, which would in effect, be given to National Steel as a part of the sale. Certainly, a loan of plan assets to the employer is prohibited by Section 1106. see, e.g. *Freund* v. *Marshall & Illsley Bank*, 485 F. Supp. 629 (Wis. 1979), *Marshall* v. *Kelly*, 465 F. Supp. 341 (Okla. 1978). To reflect in the final sale price of the Weirton facility the amount of the conditional benefits which would have otherwise been paid to participants, but for amendments, makes those benefits *essential consideration* for a contract to sell the employers depleted facility. This is precisely the type of behavior prohibited by Section 1106.

In affirming the narrow reading of the term "transaction" utilized by the District Court, the Fourth Circuit clearly erred. Certainly, if plan assets were used by the Company as security for a sale by the Company of one of its divisions, Section 1106 was violated. Pursuant to *McDougal* v. *Donovan*, 552 F. Sup. 1206 (IL 1982), and its progeny, ERISA should be given a liberal construction to further the policies of the Act. In fact, the Congressional history reveals:

> "*The statute prohibits the direct or indirect transfer of any plan income or assets to or for the benefit of a party-in-interest. It also prohibits the use of plan income or assets by or for the benefit of any party-in-interest. As in other situations, this prohibited transaction may occur even though there has not been a transfer of money or property between the plan and a party-in-interest. For example, securities purchases or sales by a plan to manipulate the price of the security to the advantage of a party-in-interest constitutes a use by or for the benefit of a party-in-interest of any assets of the plan.*" [1974] U.S. Code Cong. & Ad. News 5089.

The transaction occurring in Weirton, West Virginia, used plan assets, whether styled "vested," "contingent," or "ancillary," to benefit National Steel Corporation in the sale of its own depleted Weirton facility.

Even if the term "assets" is given a restrictive meaning, the terms of Section 1106 were still violated. Section 1106(b)(2) precludes a fiduciary from acting in a transaction on behalf of a party whose interests are adverse to the plan participants and beneficiaries. It was in National's best interest to sell this Mill, but it was not in the best interests of the petitioners to amend these plans. The entire transaction was ridden with fiduciary implications and violations.

Finally, the Appellate Court noted that "the Appellants have cited no case in support of their position." This was not the case. Precedent was cited throughout the oral argument and written briefs. However, there simply is no case directly on point, and this is the reason that this Honorable Court is asked to review the holding of the Fourth Circuit. This transaction, which has resulted in the denial of Petitioners supplemental pension and severance benefits, constitutes the largest employee purchase in history and could pave the way for further abuse by employers who stand as fiduciaries in future employee purchases if left undaunted.

Throughout its opinion, the Fourth Circuit Court indicated a concern for the Legislative history. It should be noted that the Committee explicitly stated its desire "not to discourage early retirement plans." Without this Court's intervention, the impact of the Fourth Circuit opinion will be to create a chilling effect on all early retirement plans which does not auger well for the future of older workers in basic industries such as steel.

The conflict-of-interest provision, that the fiduciary not act "on behalf of a party . . . whose interests are adverse to the interests of the plan," applies to "any transaction involving the plan." 29 U.S.C. Sec. 1106(b)(2). This was just such a transaction and the actions of the fiduciary violated the Act. It is submitted that the holding of the Fourth Circuit to the contrary is in error.

III. The Court Below Erred In Affirming The Northern District's Dismissal Of Pendent Claims.

In Paragraph V of its opinion, the Fourth Circuit summarily affirmed the lower court's dismissal of pendent State claims in this action. No reason or explanation was given. On June 3, 1983, the trial court dismissed certain pendent claims which alleged that the respondents conduct violated the substantial public policy of the United States and the State of West Virginia. Respondents' violation of specific provisions of ERISA would contravene a substantial public policy of the State of West Virginia, as a matter of law, because West Virginia Code, Section 21-1A-1(a), declares that it is the public policy of the State to "protect the rights of individual employees. . . ." It is clearly established under West Virginia law that an employer may be held liable in tort and contract for damages occasioned by such employer's acts when the unlawful conduct is motivated by factors which contravene the substantial public policy of the State of West Virginia or the implied and expressed promises of the employer. *Harless* v. *First National Bank in Fairmont*, 246 SE 2d 270 (W.Va. 1978); and later, 289 SE 2d 692.

Further, Section 510 of ERISA specifically states in pertinent part:

> *"It shall be unlawful for any person to discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . ."*

Clearly, National Steel did interfere with just such a right. The right to supplemental benefits triggered by their own actions. Thus, there is a common nucleus of operative facts between the ERISA and pendent claims, in that the respective claims are such that the expectation is that they would be considered in one judicial proceeding. See, *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). Further, the State law claims were appropriate for Federal Court determination because they formed a separate but parallel, ground for relief also sought in the substantial Federal claim based on ERISA. *Hurn* v. *Oursler*, 289 U.S. 238 (1933). The provisions of the

plan, deleted by forced amendment, gave rise to additional benefits to these petitioners by right upon the severance of their employment with the National Steel Corporation.

The dismissal of these pendent claims, as well as the summary affirmation of the lower court's grant of final judgment, constitutes a violation of substantial procedural due process. Accordingly, this High Court is respectfully requested to grant petitioners writ for review.

CONCLUSION

The Instant Petition presents this Honorable Court with complex first impression legal issues involving the application of fiduciary principles in the context of the largest employee purchase in history. In so doing, it presents a unique opportunity for this Court to chart a path for future transactions such as this by defining the appropriate boundaries within which a prudent fiduciary must operate in such a transaction.

Here, a Federal Trial Court refused to allow discovery and on the basis of a sparse record, granted final judgment against the aggrieved petitioners. The Fourth Circuit Court of Appeals affirmed the trial court's opinion and, thereby, condoned the conduct of the fiduciary by erroneously reasoning that fiduciary principles, mandated both by Federal Law and the Common Law which it codified, simply did not apply to this transaction.

The petitioners assert that such judicial action simply ignored all precedent enunciated by the Supreme Court in its repeated opinions regarding the conduct of fiduciaries, as well as the mandates of ERISA; the Act's Congressional History and every tenet of procedural Due Process.

For all of the above reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

JOHN RANDOLPH SPON, JR.
Counsel of Record

KEITH A. FOURNIER
SPON & FOURNIER
Suite 904-911
AmeriTrust Bank Building
Steubenville, OH 43952
(614) 282-3600
Counsel for Petitioners
Eugene R. Sutton, *et al.*, and
Petitioners Edward Dhayer, *et al.*

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1567
No. 83-2003

Eugene R. Sutton; Raymond Ludewig; Paul D. Alexander; Anthony J. Angelo; John P. Barlas; Thomas V. Barnhouse; William Bell; Walter Birrell; Pete Brier and Camden Bumgarner, *et al.*,

Appellants,

v.

Weirton Steel Division of National Steel Corporation; Independent Steel Workers Union and Pension Agreement between the National Steel Corporation and the Independent Steelworkers Union,

Appellees.

No. 83-1569
No. 83-1895

Gerald W. Brunner; Clarence Rifkee; Norman Clark; James Hoge and all others similarly situated,

Appellants,

v.

National Steel Corporation; Independent Steelworkers Union; Weirton Joint Study Committee, Inc. and Pension Agreement between the National Steel Corporation and the Independent Steelworkers Union,

Appellees.

No. 83-2004

Edward Dhayer; Edward Bittner; Richard Blancato and James H. Browning, *et al.*,

Appellants,

v.

Weirton Steel Division of National Steel Corporation and Independent Steelworking Union,

Appellees.

Argued December 7, 1983

Before PHILLIPS and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Barry Laine (Anthony P. Sgambati, II, David Roloff, Green Schiavoni, Murphy, Haines & Sgambati Co. L.P.A. on brief) and John Randolph Spon, Jr. (Keith A. Fournier, Spon & Fournier on brief) for appellants; Carl H. Hellerstedt, Jr. (Joseph Mack, III, Brian J. Dougherty, Thorp, Reed & Armstrong on brief); David L. Robertson (William Kiefer, Peter Rich, Bogarad & Robertson on brief); Anthony F. Phillips (Gerald Kerner, Brian E. O'Connor, Laurence H. Lenz, Jr., Willkie Farr & Gallagher on brief) for appellees.

Decided DEC 30 1983

BUTZNER, Senior Circuit Judge:

This appeal of consolidated cases arises out of an agreement by National Steel Corp. to sell its Weirton Steel Division to a new company, Weirton Steel Corp., which is owned by the Division's employees. The district court granted partial summary judgments in favor of National, its Retirement Program, and the Independent Steelworkers Union.* Finding no just reason for delay, it entered final judgment pursuant to Federal Rule of Civil Procedure 54(b) on the issues that it had considered. The appellants, a minority of the employees at the Division, assert that the district court erred by holding that National did not violate the Employee Retirement Income Security Act (ERISA), that the union did not breach its duty of fari representation, that class certification was inappropriate, and that the appellants were not entitled to injunctive relief.

We find no cause for reversal in these assignments of error and affirm the judgments of the district court.

I

In March 1982, National announced that it would reduce capital expenditures, production capacity, and employment at the Division. It also said it would consider a sale of the Division. The Weirton Joint Study Committee, Inc., was then established to study the possibility of forming a corporation owned by employees to purchase the Division. The committee included five representatives of management, twenty-one representatives of the Independent Steelworkers Union, and three representatives of the Independent Guard Union. The committee retained legal counsel and commissioned consultants to make a feasibility study. It also engaged other firms to assist with aspects of the proposed transaction requiring particular expertise.

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*Dhayer v. Weirton Steel Division of National Steel Corp., 571 F. Supp. 316 (N.D. W.Va. 1983); Sutton v. Weirton Steel Division of National Steel Corp., 567 F. Supp. 1184 (N.D. W.Va. 1983).

The agreement of sale provided for modification of pension and severance benefits contained in the collective bargaining agreements for union employees and in National's retirement program and personnel policies for salaried nonunion employees. These benefits and the amendments are essentially the same for all employees. union members approved the changes in the bargaining agreements and other terms of sale. National unilaterally changed its program and policies for nonunion members.

The benefits and the amendments affecting them are fully described in the opinions of the district court. For the purposes of this appeal they can be recepitulated as follows. All workers, whether they choose to work for the new company or not, will retain the normal retirement benefits earned through service with National before the sale. National will segregate all assets attributable to the Division and establish a separate trust available to pay normal retirement benefits to past and present Division employees. The new company will be responible for benefits accrued after the change in ownership. Whe an employee who has worked at both companies retires, his years of service will be aggregated, an he will receive beneftis from National and the new company in proportion to his service for each.

In addition to normal retirement benefits, National provided early retirement benefits and severance pay in the event of shutdown or layoff for employees with the requisite combination of age and years of employment. For convenience, we will refer to these benefits and severance pay collectively as contingent benefits. These benefits were not funded. They were payable, if at all, from National's corporate treasury. The agreement stipulates that the sale of the Division will not trigger payment of the contingent benefits if within five years of the sale Weirton Steel closes. Contingent benefits similar to those formerly available at National will be provided by the new company.

The appellants protest the agreement to eliminate National's obligation for the contingent benefits upon the sale of the Division. It is their position that, regardless of their immediate employment by the new company, their status as employees of National will be terminated by the sale. In the absence of the agreement, they insist, the sale would entitle them to the contingent benefits. They point out that the shutdown benefits alone, without the severance pay, would aggregate approximately $300,000,000 and that National has avoided this liability.

II

Summary disposition of the issues presented in this appeal was appropriate. All of the material facts, save one, were established by uncontradicted evidence. To fill the hiatus occasioned by the single dispute over a genuine issue of fact, the district court accepted as proved the allegations that National's sole motivation for the sale was avoiding future pension obligations. *See Dhayer*, 571 F. Supp. at 326; *Sutton*, 567 F. Supp. at 1198.

Though permitted by 29 U.S.C. § 1108(c)(3) to serve as an administator of its pension plan, National's fiduciary obligations were not diminished by its dual role. *Donovan* v. *Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982). National was required to discharge its fiduciary duties "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). ERISA's requirements "insulate the trust from the employer's interest," and, consequently, National was not permitted to assume a position where it had "dual loyalties" in the administration of the plan. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 333-34 (1981).

By retaining liability for all normal retirement benefits and establishing a separate trust for their payment, National did not violate any provision of ERISA or any fiduciary obligation with respect to accrued benefits, which under the plan were payable at age 65. The critical question, therefore, is whether

ERISA imposes any fiduciary obligations to maintain the contingent benefits about which the appellants complain. If it does, summary judgment was inappropriate, because in avoiding the payments through sale of the Division, National's self-motivation, which the district court assumed for the purpose of this proceeding, cannot be reconciled with its fiduciary duties. On the other hand, if ERISA does not impose an obligation on National to maintain the contingent benefits, National in its capacity as an employer could undertake to eliminate them.

Under ERISA's vesting rules, only accrued benefits must be nonforfeitable. 29 U.S.C. § 1053(a). With respect to the issues raised by these appeals, ERISA defines an accrued benefit as an "annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23). The accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance payments. The Act was not designed to prohibit modification of these ancillary benefits. *See* H.R. Conf. R. No. 1280, 93d Cong., 2d Sess. 273, *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5054; H.R. Rep. No. 807, 93d Cong., 2d Sess. 60-61, *reprinted in* 1974 U.S. Code Cong. & Ad New 4670, 4726. Rather, Congress believed that the "vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S Code Cong. & Ad News 4890, 4935. An employer may change such benefits without violating ERISA. *See Fentron Industries, Inc* v. *National Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982). *But cf. Dependahl* v. *Falstaff Brewing Corp*, 491 F. Supp. 1188, 1196-97 (E.D. Mo. 1980), *modified*, 653 F.2d 1208 (8th Cir. 1981). Any right to payment of benefits before normal retirement age must be found in pertient employment agreements. *Fine* v. *Semet*, 699 F.2d 1091, 1093 (11th Cir. 1983). Consequently, National, in its capacity as an employer, did not violate ERISA.

Also, National, in its capacity as a fiduciary, did not violate ERISA. Congress authorized an employer to administer its pension plan, and in the discharge of its duties with respect to the plan, the employer must satisfy the exacting fiduciary standards imposed by ERISA. Congress, however, has not prohibited an employer who is also a fiduciary from exercising the right accorded other employers to renegotiate or amend, as the case may be, unfunded contingent benefits payable before normal retirement age. The changes, accomplished in this manner, are not to be reviewed by fiduciary standards.

These conclusions are sustained by *United Mine Workers Health and Retirement Funds* v. *Robinson*, 455 U.S. 562, 573-76 (1982). *Robinson* dealt with the fiduciary obligations imposed by § 302 of the Labor Management Relations Act, 29 U.S.C. § 186, on trustees of a fund for employee benefits. Nevertheless, it is pertinent because the high fiduciary standards exacted by both the Labor Act and ERISA are essentially the same. In *Robinson*, benefits created by the collective bargaining agreement were changed by renegotiation. The Court held that the changes were not to be reviewed under fiduciary standards, cautioning: "[W]hen neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract." 455 U.S. at 576.

III

In addition to the general fiduciary standards imposed by § 1104, Congress also prohibited fiduciaries from engaging in certain specified conduct, including transferring assets of a plan to a party in interest, dealing with assets for their own account, and acting in any capacity in a transaction involving the plan on behalf of a party whose interests are adverse to the plan. 29 U.S.C. § 1106. *See NLRB* v. *Amax Coal Co.*, 453 U.S. 322. 332-34 (1981). the appellants assert that the district court erred by holding that National did not violate these provisions of § 1106. They base their argument on two premises: first,

that National's liability for the contingent benefits was an asset of the plan; and, second, that National illegally caused the plan to relinquish this asset by agreeing that the sale would not trigger payment of the contingent benefits. The appellants support their argument by the affidavit of an actuary who expressed the opinion that National's liability was an asset of its pension fund.

It may well be that a prudent actuary would consider National's contingent liability for benefits in view of the domestic steel market. Certainly responsible management would want to know the magnitude of its exposure if the plant were shut down. But the actuary's opinion is not proof that National's contingent liability is an asset of the plan within the meaning of ERISA. No provision of the Act requires this contingent liability to be funded as an asset of the plan. The parties recognize that if National should become liable for the contingent benefits, the pension fund, which is dedicated to the payment of normal retirement benefits, cannot be diverted for this purpose. *See Cutaiar* v. *Marchall*, 590 F.2d 523, 528-30 (3d Cir. 1979). The only source of payment would be the company's treasury. National in its capacity as the manager of its business can use its corporate treasury for general corporate business. Conversely, in its capacity as a fiduciary, National is not required by ERISA to account for expenditures from its corporate treasury that are disbursed for general corporate purposes.

National has not caused the benefit plan to engage in a transaction with respect to the contingent benefits. The benefit plan covers the employees of several divisions. The segregation of assets available for normal retirement of Division employees and the establishment of a separate trust for this purpose is in essence a bookkeeping transaction. No funds held by the pension plan will be depleted or recouped by the company because of the agreement not to trigger the contingent benefits.

In short, ERISA does not impress a trust upon National's corporate treasury for the payment fo the contingent benefits. The appellants have cited no case in support of their position. It is the unfunded nature of National's contingent liability that distinguishes this case from the cases, on which the appellants rely, where courts have found that fiduciaries have violated § 1106. *See, e.g., Cutaiar* v. *Marchall*, 590 F.2d 523 (3d Cir. 1979); *McDougall* v. *Donovan*, 522 F. Supp. 1206, 1212-16 (N.D. Ill. 1982). Accordingly, we conclude that the district court correctly ruled that National did not violate § 1106.

IV

The district court held that undisputed evidence established that the Independent Stellworkers Union did not breach its duty of fair representation by agreeing to the terms of sale. The appellants assign error to this aspect of the court's judgment on both substantive and procedural grounds.

The union had a statutory duty to represent fairly all of the Division employees in its bargaining with National. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953). To establish a breach of the duty of fair representation, the appellants must show that the union's conduct was arbitrary, discriminatory, or in bad faith. *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967).

Confronted with the prospect of the loss of several thousand jobs, the union through the Joint Committee participated in negotiating the Division's sale. The union relied on the advice of expert consultants. It agreed to the terms of sale only after its members had ratified the changes in the bargaining agreement that are the subject of the appellants' complaint. the agreement treats all unio members equally, although it has an immediate effect on the appellants, who have sufficient service to qualify for the contingent benefits.

It is enevitable in the give-and-take of collective bargaining that some employees will fare worse than others. But a union may compromise to achieve long-term advantages, even though individual employees may be affected differently by the

resulting agreement. *See Humphrey* v. *Moore*, 375 U.S. 335, 349-50 (1964); *Ford Motor*, 345 U.S. at 338; *Ekas* v. *Carling Nat'l Breweries, Inc.*, 602 F.2d 664, (4th Cir. 1979). In concert with the district court, we hold that the evidence conclusively establishes that the union's conduct was not arbitrary, discriminatory, or in bad faith. Consequently, the union did not breach its duty of fair representation.

The appellants also contend that the court committed procedural error by granting summary judgment to the union without a pending motion under rule 56 and without affording them the notice and protection afforded by rules 12(b))6) and 56. They also protest the court's denial of further discovery.

Ordinarily an assignment of error similar to the appellants' would dictate vacating the district court's judgment. But considering the procedures followed in this case and the voluminous evidence the parties presented, we find no error that survives application of the harmless error provisions of rule 61. The trial court consolidated these cases for hearing, briefing, and argument. It denied the union's motion for judgment on the pleadings without reaching the merits of the motion. Instead, the court noted the relationship between the alleged illegal conduct of both National and the union, and it indicated that these issues must be considered together. At the direction of the court, all parties filed statement of issues, which included the question of the union's representation. This question was again raised in National's motion for summary judgment. Consequently, we are satisfied that the appellants has ample notice and full opportunity to participate without prejudice in the procedure that the court subsequently followed in granting summary judgment.

V

In view of our conclusions about the prinicpal issues raised by the appellants, the remaining asssignments of error require no discussion. The district court did not err by dismissing pendent state claims or by denying class certification and injunctive relief.

The judgments of the district court are affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 83-00-35-W

EUGENE R. SUTTON, et als.,

Plaintiffs

v.

WEIRTON STEEL DIVISION OF NATIONAL STEEL COPRORATION; INDEPENDENT STEEL WORKERS UNION; PENSION AGREEMENT BETWEEN THE NATIONAL STEEL CORPORATION AND THE INDEPENDENT STEELWORKERS UNION,

Defendants.

Filed at U.S. District Court, Wheeling West Virginia
Thomas Strafford, Clerk

ORDER

On the 13 day of April, 1983, came the named plaintiffs by counsel, and also came National Steel Corporation by counsel and Independent Steelworkers Union by counsel, and thereupon in consideration of the matters offered in support of and in opposition to Plaintiffs' Motion for a Temporary Restraining Order, Rule 65, Federal Rules of Civil Procedure, it is

ORDERED that said Motion for Temporary Restraining Order be, and the same is hereby, DENIED for reasons expressed by the Court on the record.

It is further ORDERED that a Preliminary Injunction hearing is scheduled in the above styled civil action for a day in the week of April 25, 1983, a precise date to be ascertained by the Court and communicated to counsel as far in advance of the

preliminary hearing date is possible, the Court being unable at this time to establish a precise date for hearing Plaintiffs' Motion for a Preliminary Injunction because of ongoing criminal jury trials.

ENTER: May 4th, 1983, as of April 13, 1983.

Robert E. Maxwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 83-0035-W

EUGENE R. SUTTON, et als.,
Plaintiffs

v.

WEIRTON STEEL DIVISION OF NATIONAL STEEL COPRORATION; INDEPENDENT STEEL WORKERS UNION; PENSION AGREEMENT BETWEEN THE NATIONAL STEEL CORPORATION AND THE INDEPENDENT STEELWORKERS UNION,
Defendants.

Filed at U.S. District Court, Wheeling West Virginia
Thomas Strafford, Clerk

ORDER

On the 27th day of April, 1983, came all of the named parties by counsel and thereupon the Court proceeded to consider all matters presented in support of and in opposition to Plaintiffs Motion for a Preliminary Injunction herein, and for the reasons stated by the Court at the conclusion of the presentation of evidence, supporting documents, affidavits and other pleadings by all parties, it is

ORDERED that Plaintiffs Motion for a Preliminary Injunction be, and the same is hereby, DENIED.

It is further ORDERED, in keeping with the oral motion made by counel for plaintiffs at the outset of the Preliminary Injunction hearing to file a First Amended Complaint herein, that the said first amended complaint be, and the same if hereby ORDERED filed and made a part of the above styled civil action, said first amended complaint being offered for the

purpose of adding as a party defendant Pension Agreement Between the National Steel Corporation and the Independent Steelworkers Union as reflected in paragraph #173(a).

ENTER: May 4th, 1983, as of April 29, 1983.

Robert E. Maxwell
United States District Judge

I hereby certify that the annexed in instrument is a true and correct copy of the orginal on file in my office, Attest: Thomas F. Stafford, Clerk, U.S. District Court, Northern District of West Virginia.

Sue O. Abraham
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 83-0035-W

EUGENE R. SUTTON, et als.,
Plaintiffs

v.

WEIRTON STEEL DIVISION OF NATIONAL STEEL COPRORATION; et als,
Defendants.

Civil Action No. 83-0040-W

GERALD W. BRUNNNER et als.,
Plaintiffs

v.

NATIONAL STEEL CORPORATION, et als,
Defendants.

U.S. DISTRICT COURT
FILED AT WHEELING, W. VA.

THOMAS F. STAFFORD
Clerk

MERMORANDUM OPINION AND ORDER

This litigation grows out of the activities in connection with a proposed employee buy-out plan for the Weirton Steel Division of National Steel Corporation. Defendant National Steel has filed a motion for summary judgment and Plaintiffs in these cases and in *Dhayer, et al*, v *National Steel Coproration, et al.*, C.A. No. 83-36-W (N.D. W.Va. filed April 8, 1983) have filed a motion to delay consideration of National's motion pursuant to Rule 56(f), Federal Rules of Civil Procedure.

The Court greatly appreciates the efforts of all counsel in the exhaustive briefing of the issues presented.

The record in this litigation includes the pleadings and exhibits thereto; various affidavits offered in support of as well as in opposition to this motion and other previous motions; and evidence adduced in the form of testimony and documents at two hearings conducted on April 13, 1983, at the Elkins point of holding court and on April 27-29, 1983, at the Wheeling point of holding court. From these matters of record, the Court finds the following facts are significant to the issues to be decided:

The Weirton Division of National Steel is the single largest private sector employer in the State of West Virginia. At one time, shortly after World War II, the Division had 16,000 workers, but the recent market for steel produced in the United States has reduced employment to some 11,000 in 1980, and about 7,000 currently.

In March, 1982 National Steel announced it would no longer make significant capital investment in its Weirton Division facilities, and that those facilities would be "downsized" over a period of time with a resulting level of employment of 1,200 to 2,000 workers in the late 1980's. The President of National Steel indicated the announcement was not an attempt to win labor cost concessions, but reflected the business decision of National to place its investment capital in other areas. In addition to National's announced intention to downsize the Weirton facilities, the options for the Division seemed to include finding a buyer or to devise a plan for an employee buy-out. National's management indicated a willingness to explore either of these options.

On the day of National's announcement, the International Steelworkers Union announced its intention to work with Weirton Division management to study the possibilities of employee buy-out, and, if feasible, to open negotiations with National Steel. The Weirton Joint Study Committee was incorporated to study the employee buy-out option and coordinate related efforts. The Committee's board of directors consists of

five representatives of the Weirton Division management team, twenty-one representatives of the Independent Guard Union. Funds for the various activities of this Committee were raised from the unions involved, community donations, grants from the State of West Virginia, and other sources.

In April, 1982, after a competitive selection process, the Joint Study Committee hired the consulting firm of McKinsey & Co. to conduct a feasibility study on the economic viability of an independent, employee-owned Weirton Steel company. In July 1982, McKinsey & Co. released a report concluding that such a venture could be successful, but only if labor and production costs were reduced and if substantial capital improvements could be effected over a period of ten years.

The employee buy-out option preferred by the Joint Study Committee and the one pursued included an Employee Stock Ownership Plan (ESOP), which will allow the new employee owned corporation to borrow funds to finance the sale from National and permit employees who satify minimum hours of work to earn shares of stock as initial loans are paid. An ESOP presents an opportunity for significant tax savings for the proposed company under the Internal Revenue Code.

As the employee buy-out plan progressed, the Joint Study Committee hired other consultants to assist in formulating various complex aspects of the procedure. These include the law firm of Ludwig & Curtis, of San Francisco, to advise on the structure of an ESOP; the law firm of Wilkie, Farr & Gallagher, of New York, to represent the Committee and the proposed new corporation in negotiations with National Steel regarding acquistion of the Weirton Division assets; the investment banking firm of Lazard Freres & Co., of New York, to assist with all questions of finance; the accounting firm Towers, Perrin, Foster & Crosby, of Pittsburgh, to conduct an audit of National's pension plans for Weirton Division employees. All of these consulting firms, and others involved in the study, enjoy national or international reputations for expertise in the fields for which they were hired.

During the summer of 1983, the Independent Steelworkers Union conducted elections which resulted in a new Union leadership team, and by virtue thereof, new Union representation on the Joint Study Committee. The former president of the Union, Richard Arango, filed unfair labor practice charges against National Steel and the Independent Steelworkers Union with the National Labor Relations Board on April 5, 1983. The charges alleged representatives of the employer (National Steel) have participated on a negotiating committee which purports to represent bargaining unit employees in collective bargaining negotiations with the employer. The Court presumes the "negotiating committee" means the Joint Study Committee, on which Arango formerly served as co-chairman by virtue of his Union presidency. One of the *Sutton* plaintiffs, William Willboughpy, served on the committee's board of directors until he was voted out of his Union office of Vice Chairman, Tin Mill Division.

On March 11, 1983, National Steel and Wilkie, Farr & Gallagher (the law firm hired to negotiate a sale of Weirton Division assets for the Joint Study Committee) announced an agreement in principle for the terms of sale from National to Weirton Steel Corporation (the proposed employee-owned company). The agreement has been amended by an addendum announced April 8, 1983. During 1983, Wilkie, Farr & Gallagher formed a "shell" corporation in the State of Delaware in anticipation of the success of the employee buy-out venture.

In order to carry out the provisions of the agreement in principle, as amended, and to implement the employee buy-out, members of the Independent Steelworkers Union and the Independent Guard Union must conduct an election to modify existing collective bargaining agreements with National Steel. Both the mechanisms of the employee buy-out and the implications of such a venture are extremely complex. In order to inform union memberships of the various aspects of the proposal, the Joint Study Committee and its consultants have taken steps to produce a "disclosure document" which they hope will reveal all of the facts necessary to an understanding of the

venture and its ramifications for the employees of the new Weirton Steel company.

Should the employee buy-out be implemented, Weiton Steel Corporation will succeed National Steels's Weirton Division as the largest private-sector employer in West Virginia. It will also be one of the largest corporations in the United States and *the* largest employee-owned corporation in the country. As all the parties are aware, the venture (like any large corporate undertaking) is not without risk. Consultants for the Joint Study Committee believe success is possible, given certain economic and social circumstances. However, it must be realized that such expressions are only educated forecasts. Long term success depends upon general economic trends, as well as trends specifically involving markets for the products at the Weirton facility.

For members of the Independent Steelworkers Union and the Independent Guard Union, two personal choices must be made before an employee-owned company can become a reality. First, as mentioned earlier, a majority of the Union members must decide to vote in favor of amendments to the existing collective bargaining agreement which will reflect the terms of sale from National to the New Weirton Steel company. Second, each member must make a personal decision on whether to become an employee of the new company. For some workers, the second decision will be made more difficult because of the opportunity for immediate retirement from National with totally predictable pension and other benefits for the future. The terms of sale, as amended, include provisions that employees meeting the chronological age and years of service requirements, for some of the types of retirement in the applicable pension plan, for some of the types of retirement in the applicable pension plan, may elect to retire five days after the union votes referred to above. Such decision to retire will be effective as of April 30, 1983, a date before the transfer of ownership, but a date set for accounting purposes.

All workers, whether they choose to work for the new company or not, will retain the pension benefits earned through

service with National Steel prior to the tranfer of ownership (with the exception of certain "safety net" features to be discussed below) will be the responsibility of the new employee-owned company. Plaintiffs express the concern that pension rights earned after transfer to the new compnay will not be as secure as those earned under National Steel, which has a proven record of corporate stability.

Of course, the union members may decide not go forward with the proposed employee buy-out and in such event the underlying issues will be moot. While the alternative appears to be massive unemployment in the tri-state community, the workers may feel that the risks of a new steel production venture in an uncertain market are too high. In short, the ultimate decision on whether to go forward with the employee buy-out rests with the members of the union through their approval or disapproval of the terms of sale and other aspects of the new venture.

STATEMENT OF THE ISSUES

This litigation focuses on the propriety of terms of sale regarding pension and severance pay benefits for members of the Independent Steelworkers Union. Amendments to existing pension and collective bargaining agreements must be approved before a transfer of the Weirton Division from National Steel to an employee-owned entity can be effected.

Defendant National Steel filed a proposed statement of the issues and requested expeditious consideration of them. This was followed by the instant motion for summary judgment. Counsel for Plaintiffs in the *Sutton* case have also filed a statement of the issues. The Court believes the issues presented by National's motion are fair statements of the major claims of the complaint in *Brunner* and many of the claims in *Sutton*, and those claims that should be decided before union members are asked to vote on the proposed employee buy-out. Not all of the issues raised in *Sutton* and *Brunner* are included in the request for summary judgment, and, therefore, the

Court views National's motion as a motion for partial summary judgment. The remaining, less issues presented by the complaints can be resolved through later proceedings.

As will be more carefully detailed below, the terms of sale between National Steel and an employee-owned company specify that the transfer of ownership, without more, will neither trigger entitlements to 70/80 retirements of Rule of 65 retirements under the applicable pension plan nor establish severance allowance payments under the applicable collective bargaining agreement. The terms also limit eligibility to 70/80 and Rule of 65 retirement after the transfer. The complaints in *Brunner* and *Sutton* charge, inter alia, that the failure of the transfer to trigger rights to these employee benefits violates various provisions of the Employee Retirement Income Security Act (ERISA), various other provisions of labor law, and the terms of the applicable pension and collective bargaining agreements. In general, the motion for summary judgment presents the legal issue of whether the terms of sale, which are proposed to amend existing pension and collective bargaining agreements, deprive any Plaintiff of a right or benefit guaranteed by law.

From examination of the pleadings, the motion for summary judgment, and other matters of record, the Court defines the following two specific issues for resolution by this partial summary judgment proceeding:

1. Whether the terms of sale proposed to amend the Rule of 70/80 and Rule 65 retirement provisions of the pension agreement between National Steel Corporation and the Independent Steelworkers Union violates:

   a. provisions of ERISA relating to prohibited transactions;

   b. provisions of ERISA relating to ficuciary duties imposed upon National Steel or the pension plan;

   c. provisions of ERISA relating to vested accrued benefits or non-forfeitable benefits;

c. provisions of the pension or collective bargaining agreements, or

2. Whether the terms of sale proposed to amend severance allowance provisions of the collective bargaining agreement between National Steel Corporation and the Independent Steelworkers Union violates:

a. provisions of ERISA relating to prohibited transactions;

b. provisions of ERISA relating to fiduciary duties imposed upon National Steel;

c. provisions of ERISA relating to vested accrued benefits or non-forfeitable benefits;

d. provisions of the collective bargaining agreement, or

e. other provisions of labor law as specified in the complaints.

As various points in the *Brunner* and *Sutton* complaints it is alleged that National Steel and the Independent Steelworkers Union acted in concert. Although the instant motion has been propounded only be Defendant National Steel, the Court must necessarily examine actions by the Union to reach the issues persented.

It is important at this point to specify matters the Court does not consider in its decision on the motion for partial summary judgment. Several claims by the Plaintiffs have earlier been resolved on motion to dismiss, and need not be further considered here. These include the claim that the Joint Study Committee exceeded its corporate charter, as was alleged in the *Brunner* complaint, and the claims that the actions of Defendants violated the West Virginia Labor Management Relations Act and other policies of the Government of West Virginia, as alleged in the *Sutton* complaint.

In addition, as has previously been mentioned, Richard Arango, who is not a party to this litigation, but who is represented by counsel who is represented by counsel who is also

representing the *Brunner*. Plaintiff has filed unfair labor practice charges before the National Labor Relations Board (NLRB). Several allegations charging violations of federal law in the *Brunner* complaint at §§ 21, 36, and 43, and in the *Sutton* complaint at §§ 210, etc., involve the same factual and legal questions as have been presented to the NLRB in the above-referenced unfair labor practices charges. The Court is of the opinion that those claims which directly relate to the legality of the Independent Steelworkers Union and the Independent Guard Union joining forces with Weirton Division management, through the Joint Study Committee, to negotiate terms of the sale of the Weirton Steel Division to a proposed employee-owned corporation should await a decision by the NLRB, the administrative body having special competence in this area.

Finally, the Court would note that this litigation has focussed on the effects of the proposed sale on the Independent Steelworkers Union and its members to the exclusion of members of other unions and nonunion, salaried employees at the Wierton Division of National. The answer of Defendant Union in *Sutton* denies that all Plaintiffs in that civil action are actually members of the Union. That is a factual issue that must be left for later resolution. This Opinion and Order will only affect those Plaintiffs who are members of the Independent Steelworkers Union who are production, maintenance, and hourly-rated clerical employees. The litigation has also focussed on the legality of the terms of sale which, if approved, will modify terms of existing pension and collective bargaining agreements to the exclusion of such terms of employment, compensation, etc., for workers of the new employee-owned company that may be negotiated by the Union and management representatives of the proposed company.

ISSUES AFFECTING BOTH PENSION AND SEVERANCE CLAIMS

The specific issues presented by the instant motion must be decided in the context of an employer desiring to close a substantial portion of a major steelmaking plant and the employees taking steps to pursue an employee buy-out, with the

support and aid of the community. There are some underlying principles of law which will control the Court's decision on both the pension and severance allowance questions.

At the outset, the Court would note that unions are, and should be, permitted to pursue unique procedures and mechanisms to avoid loss of employment for union members when faced with crisis-type situations, such as an impending plant closure. *See United Steelworkers of America* v. *United States Steel Corp.*, 492 F. Supp. 1, 9-10 (N.D. Ohio), *aff'd in part, rev'd in part*, 631 F.2d 1264 (6th Cir. 1980). It has been held that unions and employers in such circumstances may take steps not contemplated in existing documents controlling normal labor relations. *See Ekas* v. *Carling Nat'l Breweries*, 602 F.2d 664, 666-667 (4th Cir. 1979), *cert denied*, 444 U.S. 1017 (1980). Indeed, the parties here are exploring relatively uncharted waters. The employee buy-out, if approved and implemented, apparently will result in the largest employee-owned company in the nation.

All parties agree that the March 2, 1982, announcement by National Steel that it would no longer invest in its Weirton Division was not a ploy to coerce workers into giving labor cost concessions. It was an economic decision by the corporation to place its investment capital in other areas. It is further uncontroverted that National expressed willingness to explore an employee buy-out or other option. (Bish Affidavit, *Brunner* case, Paper 5, § 8); (Willoughby Affidavit, *Sutton* case, Paper 21, § 12); The Independent News, March 16, 1982, at 1 (Plaintiffs' exhibit 10, hearing of April 27, 1983); Letter of Richard Arango (Plaintiffs' Exhibit 9, hearing of April 27, 1983). In general, it would appear the employer and the employees took appropriate positions and pursued appropriate activities in the circumstances. Though not concerned with National's economic decision to phase-out Weirton Division, employer and employees began to explore avenues to ameliroate the effects of the decision. *See generally, First National Maintenance Corp.* v. *N.L.R.B.*, 452 U.S. 666 (1981).

As earlier stated, the terms of sale at issue here must be approved by a union vote as amendments to existing agreements with the employer before they can be implemented. There have been claims by Plaintiffs that it is unlawful to modify in any way the employees rights created under an existing agreement. (See, e.g., *Sutton* complaint at §§ 214, 219, 221; *Brunner* complaint, at § 48.) The collective bargaining agreement (at Article XXI) contains provisions allowing amendments and modifications. In addition, it is clearly permissible for union leadership to recommend to the membership a modification to an existing agreement, *See Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), even where the contract does not provide for amendments. *See Battle* v. *Clark Equipment Co.*, 579 F.2d 1338, 1347 (7th Cir. 1978). Modifications to existing contracts are frequently negotiated when the union is faced with a plant closing or phase-out. *Id.* and *Ekas* v. *Carling Nat. Breweries, supra*, 602 F.2d at 666-67.

Further, it is not per se unlawful to modify prospective pension or severance pay benfits, provided that no ERISA or other labor law is violated by the change. *See Fentron Industries* v. *Nat. Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982). Nor is it impermissible to negotiate for changes in such benefits when an employer announces a plant closing or partial closing. *N.L.R.B.* v. *North Carolina Coastal Motor Lines, Inc.*, 542 F.2d 637, 638 (4th Cir. 1976).

It is the view of the Court that the issues of labor organization law raised by these complaints boil down to whether the Independent Steelworkers Union leadership's acceptance of the terms of sale, involving severance allowances and pension benefits, as negotiated by the Joint Study Committee consultants, and the expected Union recommendation to its membership that it vote in favor of the terms of sale, is a breach of the Union's duty of fair representation. (See *Brunner* complaint at §§ 35-36, 45-48; *Sutton* complaint at §§ 200, 209-210, 212.)

It is well established that labor unions have a statutory duty to fairly represent all employees in the bargaining unit in

collective bargaining and enforcement of bargaining agreements. The duty includes an obligation to serve all members without discrimination and to exercise union discretion with good faith and honesty, and to avoid arbitrary conduct. *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967). The breach of such duty occurs only when a union's conduct is arbitrary, discriminatory, or in bad faith. *Id.* at 190.

On the basis of reasoning set forth below, the Court concludes that the proposed amendments to the pension agreement and to severance pay allowance provisions in the collective bargaining agreement violate neither ERISA nor the terms of existing agreements. Therefore, it cannot be said that the Union will act in bad faith in recommending the terms of sale, with the amendments to said agreements, to its membership. Because the amendments apply to all Union members equally (indeed, most amendments apparently will affect all employees at National's Weirton Division, whether Independent Steelworkers members or not), it cannot be said that the Union acted with discrimination toward any sub-group of the membership. *See generally*, *Ekas* v. *Carling Nat. Breweries, Inc.*, *supra*, 602 F.2d 664.

There is no doubt that the Joint Study Committee is union-dominated. (See Articles of Incorporation, Exhibit to Affidavit of Walter Bish, Brunner case, Paper 5.) The evidence adduced at the two hearings on preliminary injunctive relief earlier conducted has impressed the Court with the quality and scope of consulting firms employed by the Joint Study Committee. It appears that each major step in the complex process or arranging for the proposed employee buy-out — feasibility, financing, auditing existing labor costs, corporate structure, terms of sale, etc., — has been entrusted to firms with national or international repurtations. Testimony adduced indicates that the Committee extensively relied on the work of the experts hired. Plaintiffs have made no specific allegation that the decision to recommend the severance allowance and pension benefit amendments was arbitrary, and, under the circumstances, it would appear that such an allegation would be insubstantial.

In conclusion, the Court is satisfied that the Union violated no duty of fair representation with regard to severance allowance and pension benefit amendments in the *Sutton* and *Brunner* cases.

In addition, union fiduciary duties in regard to employee welfare plan participants and beneficiaries arising under ERISA or other federal labor law are not necessarily when union leadership participates in negotiations for amendments to existing agreements and recommends the products of such negotiations to union membership. *See NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), *Carr* v. *Learner*, 457 F.2d 135 (1st Cir. 1976). *See generally, UMWA Health & Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982). This Court is of the view that this principle applies in the instant, unique situation when agents negotiate with the employer on behalf of a union-dominated committee.

PENSION BENEFIT ISSUES

Under the existing pension agreement between National Steel and the Independent Steelworkers Union, there are eight distinct types of retirement, of methods of determining eligibility for a pension.[1] For normal retirement; 62/15 retirement; 30-year retirement, and 60/15 retirement, the plan participant becomes elibible simply through acheivement of certain

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[1] National Steel Corporation maintains a pension plan (referred to in the record as Plan 001) for all types of employees (union and non-union) at various corporate facility locations including the Weirton Division. A copy of the plan has been made part of the record in each case before the Court as Exhibit A, Affidavit of John A. McCreary. The Independent Steelworkers Union has negotiated a pension agreement for their members which provides substantially the same benefits as Plan 001. A copy of this agreement has been made a part of the record in each case as Plaintiffs' Exhibit 4, hearing of April 27, 1983. Unless the corporate plan is specifically mentioned, the Court relies upon the language of the Union pension agreement for all purposes having to do with this motion for summary judgment. Thus, whether the Court refers to pension plan or pension agreement, reference is made to the Union pension agreement.

chronological age and years of service factors. Participants with 15 years of service who become permanently incapacitated, as defined in the plan, are eligible for permanent incapacity retirement. Persons with 10 years with 10 years of service whose continuous service is broken for any reason are elibible to receive a deferred vested pension after reaching age 62 or 65, depending on the particpant's age at the time service was broken. The remaining types of retirement, rule of 65 retirement and 70/70 retirement, are the subject of the pension issues in this litigation. While age and years of service are aspects included in determining eligibility, other factors are as follows:

70/80 Retirement

2.6 Any particpant who has not attained the age of 62 years and who shall have had least 15 years continous service and (i) shall have attained the age of 55 years and whose combined age and years of continuous service shall equal 70 or more, or (ii) whose combined age and years of continuous service shall equal 80 or more, and

(a) whose continuous service is broken by reason of a permanent shutdown of a plant, department or subdivision thereof or by reason of a layoff or physical disability, or

(b) whose continuous service is not broken and who is absent from work by reason of:

(1) a layoff resulting from his election to be placed on layoff status pursuant ot the provisions of the Basic Agreement applicable in the event of a permanent shutdown, or

(2) a physical disability or a layoff other than a layoff reulting from an election referred to above and whose return to active employment is declared unlikely by the Company, or

(c) whose continous service is not broken and who, while on layoff status by reason of his election to be placed on

such status pursuannt to the provision of the Basic Agreement applicable in the event of a permanent shutdown, accepts a job with the Company and, prior to the expiration of 90 consecutive calenday days from the first day worked on such job, elects to retire, or

(d) who considers that it would be in his interest to retire, and the Company considers that such retirement would likewise be in its best interest and it approves an application for retirement under mutually satisfactory conditions,

shall be eligible to retire on or after July 31, 1980 and shall upon his retirement (hereinafter "70/80 retirement") be eligible for a pension.

Rule-of-65 Retirement

2.6 Any participant (i) who shall have had at least 20 years of continous service as of his last day worked, (ii) who had not attained the age of 55 years, and (iii) whose combined age and years of continuous service shall equal 65 or more but less than 80, and

(a) whose continuous service is broken by reason of a layoff or disability, or

(b) whose continuous service is not broken and who is absent from work by reason of a layoff status pursuant to the privisions of the Basic Agreement applicable in the event of a permanent shutdown, or

(c) whose continuous service is broken and who is absent from work by reason of a physical disability or a layoff other than a layoff resulting from an election referred to above and whose return to active employment is declared unlikely by the Company, or

(d) who considers that it would be in his interest to retire, and the Company considers that such retirement would

likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions,

and who has not been offered suitable long-term employment as difined in Appendix A, shall be eligible to retire on or after July 31, 1980, and shall upon his retirement (hereinafter "rule-of-65 retirement") be eligible for a pension; provided, however, that if at the time of application ofr retirement the Company has not yet determined whether the participant will be offered suitable long-term employment, the participant will not be eligible to retire until the earlier of the date on which the Company advises the participant that he will not be offered suitable long-term employment or the date on which the particpant occurs a break in continous service.

In addition, among the provisions in the plan for calculating the amount of pension under the various types of retirement, increased pensions are described for 70/80 and rule of 65. With certain exceptions, the monthly amount determined under the regular rules is now increased by $400.00 for beneficiaries of 70/80 and rule of 65 retirement.

The terms of sale from National to the employee-owned company will require a number of changes in the existing pension agreement. However, no change will be affected that will decrease any accrued benefit as determined under the existing plan, and National Steel shall remain liable for all accrued benefits "earned" prior to the closing date. Under the terms of sale, National will segregate the liabilities and assets of the existing fund attributable to Weirton Division employees (the existing fund covers employees at other National Steel Divisions in addition to Weirton) and establish a separate trust fund and insurance contract which will only be available to pay benefits to Weirton Division employees, including those already retired, those transfering to the new company, and those on layoff status.

Those employees of National Steel who remain working under the new employee-owned company will, in effect, look to

both National and the new company for pension benefits upon retirement. The terms of sale provide a method of calculating benefits payable by each company, which is based on an individual's years of service with each employer.

Especially pertinent to this litigation are the terms which modify the eligibility for 70/80 retirement and rule of 65 retirement and the increased pension benefits for these types of retirement. For transferred employees only (those who were employees of National and who choose to become employees of the new company), conditions giving rise to eligibility for 70/80 and rule of 65 retirement will be limited to a permanent shutdown, as defined in existing pension and collective bargaining aggreements, which occurs within five years of the transfer of ownership date for accounting purposes (May 1, 1983). The increased pension ($400 per month) will only be payable if a permanent shutdown occurs. The terms of sale also require that the pension and collective bargaining agreements be modified to reflect the fact that the sale and transfer of ownership does not constitute a shutdown for purposes of pension or retirement benefits or severance allowance. (Thus, the sale and transfer of ownership, without more, will not trigger elibibility to any of these benefit programs.)

The Court earlier stated that it is not per se unlawful to alter a pension plan with respect to prospective benefits, provided the change doesn't violate other ERISA requirements. The Court must now decide whether the amendments proposed to 70/80 retirement and rule of 65 retirement violate the Act's minimum requirements for vesting, accured benefits, or nonforfeitablility.

In general terms, the labor law provisions of ERISA provide a system of safeguards designed to strengthen private employee pension and welfare bemefot benefit plans. (The provisions of ERISA made part of the Internal Revenue Code are generally not at issue here.) ERISA does not require an employer to offer any type of benefit, but if it does so, the plan must comply with the minimum requirement of the Act.

With regard to pensions, ERISA imposes no obligation on a plan to pay benefits before an employee reaches normal retirement age. Any right to earlier benefits must be found in the individual agreement. *Fine* v. *Semet*, 699 F.2d 1091, 1093 (11th Cir. 1983) (citing *Pompano* v. *Michael Schiayone & Sons*, 680 F.2d 911 (2nd Cir.), *cert. denied*, _____ U.S. _____, 74 L.Ed.2d 607 (1982). Under ERISA, normal retirement age means the earlier of normal retirement age under the plan or thelater of the time the participant attains age 65 or reaches the 10th anniversary of participation in the plan. 29 U.S.C. § 1002(24). The plan is issue defines normal retirement age as 65.

An accrued benefit is the interest in the plan to which a participant has become entitled. AmJr.2d *Pension Reform Act* § 73 (1975). In the case of a defined plan, such as at issue here, it means an individual's right to a retirement benefit determined under the plan, expressed in the form of an annual benefit starting at *normal retirement age*. 29 U.S.C. § 1002(23)(A) (emphasis supplied). A non-forfeitable pension benefit or right is a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, *which is unconditional*, and which is legally enforceable against the plan. 29 U.S.C. § 1002(19) (emphasis supplied). In sum, ERISA is designed to protect plan benefits for normal age retirement which are unconditional.

Accrued benefits under ERISA do not include such things as conditional benefits, permiums for medical and life insurance payable as a lump sum, or the value of the right to receive early retirement benefits. *See* H.R. Report No. 93-807, 93rd Cong., 2d Sess. _____, *reprinted in* 1974 U.S. Code, Cong. & Ad. News 4670, 4726. Am. Jur. 2d *Pension Reform Act* § 73 (1975). *See generally*, *Petrella* v. *NL Industries*, 529 F. Supp. 1357, 1365-1366 (D.N.J. 1982). These are ancillary benefits which may be amended or deleted without violating ERISA. *Id.*

An examination of the eligibility requirements for 70/80 and rule of 654 retirement reveals they are conditional and in the nature of early retirement benefits and cannot be considered non-forfeitable or as an accrued benefit. *Capocci* v. *General Motos Corp.*, 44 F. Supp. 1306, 1307-1308 (D. Hawaii 1978). Since the increased $400.00 per month pension payment is conditional upon eligbility for 70/80 or rule of 65 retirement, it cannot be considered non-forfeitable. The Court has considered the potential applicability of 29 U.S.C. § 1056(a) and finds that it does not require a contrary mandate on the issues raised here.

Under ERISA, "vesting" is a term that is tied to the term "accrued benefit." To prevent any possible misunderstanding of the Court's language in the previous paragraph, the proposed terms of sale with regard to 70/80 and rule of 65 retirement and the increased pension payments thereunder do not violate any minimum vesting standards under ERISA. This is because the terms of sale affecting pensions do not disturb the normal retirement benefit or the deferred vested pension benefit, *See* 29 U.S.C. § 1053, and since the terms of sale provide that all accrued benefits shall become vested upon transfer of ownership. *See* 26 U.S.C. s411(d)(3).

In short, Congress did not intend to impose upon a plan a requirement that any benefits be payable before reaching age 65 or the normal retirement age 965 in this case) under the plan. *Riley* v. *MEBA Pension Trust*, 452 F.Supp. 117, 120 (S.D.N.Y.) *aff'd*, 586 F.2d 968 (2nd Cir. 1978).

Plaintiffs in the *Sutton* litigation also allege Defendants have failed to provide sufficient information about the proposed amendments and thus allege a violation of ERISA. The Court is unable to find any provision of the Act that would mandate an employer ot supply information regarding amendments before the amendments are effected. 29 U.S.C. §§ 1022, 1024 *See* 29 C.F.R. §§ 2520.104b-3 and -4. Further, it appears uncontroverted that each member of the Independent Steelworkers Union was supplied with a copy of the agreement in principle setting forth the terms of sale (including those proposed ot

amend pension agreements) prior to the Plaintiff also claim amendments to the pension plan violate the basic terms of the agreement itself. The corporate plan document includes additional administrative provisions beyond those included in the Union pension agreement. Those provisions include, in Section VIII, National's power to amend or modify the program within certain bounds not applicable here. (The Court presumes the section on amendments is part of the pension agreement applicable to Union members. In any case, all pension plans subject to ERISA must include a provision for plan amendment. 29 U.S.C. § 1102(b).) The current collective bargaining agreement also provides for amendments in Article XXI.

Plaintiffs allegation that the amendments violate the plan itself would seem to assume that all provisions in the agreement are "written in stone," and never subject to change. Such is not sound law. *See generally, UMWA Health & Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982). As the Court understands, a proposed amendment would only violate the language of the agreement when a particular individual's unconditioned rights are affected (or the amendment is unreasonable). *Rochester Corp.* v. *Rochester*, 450 F.2d 118 (4th Cir. 1971). In other contexts, but in cases arising under ERISA, the Supreme Court has said, "it is the claim to the benefit rather than the benefit itself that must be 'unconditional' and 'legally enforceable against the plan' " *Alessi* v. *Raybestor-Manhattan, Inc.*, 451 U.S. 504, 512 (1981). *Nachman Corp.* v. *P.B.G.C.*, 446 U.S. 359, 371 (1980). Since the Court has earlier found that any rights a particular Plaintiff might have under 70/80 and rule of 65 retirement are contingent and conditional, it must also find that a proposed amendment to the provisions for these types of retirement do not violate the terms of the agreement itself.

Further, the proposed changes must be seen as reasonable. They are proposed in the context of an anticipated change in ownership where the majority of active workers will immediately become employees of the new owner. Since a "shutdown" of National's Weirton Division is not anticipated, in any sense,

it is reasonable to propose amendments which would clarify existing language regarding shutdown and suitable long-term employment. The present eligibility for 70/80 and rule of 65 retirement conditions also include such things as layoff, disability, and other matters involving the discretion of the employer. Since the amendments proposed only affect a situation that would arise after a transfer of ownership. the Court must find that eliminating such conditions are reasonable since they are properly the concern of the relationship between the new employer and the employee. (Indeed, it is uncontroverted that it is presently the plan of the Union to demand substantially the same pension benefits as presently exist from the new employer.)

Plaintiffs have not directed the Court's attention to any provision of the collective bargaining agreement which would preclude any amendments, or the specifically proposed amendment, to the pension agreement. The Court perceives no aspect of the collective bargaining agreement which would bar pension agreement modifications. Therefore, the terms of sale that propose to amend the pension agreement do not violate the terms of the collective bargaining agreeemet between National Steel and the Independent Steelworkers Union.

The terms of sale negotiated on behalf of the Joint Study Committee include what has been labelled by counsel as a "safety net" feature. In effect, National will continue to offer its former employees 70/80 and rule of 65 retirements if, and only if, the new company should suffer a shutdown of substantially all of its facilities within five years of the closing or transfer date. National Steel was not required to extend this "safety net" feature of its former employees under ERISA. This is merely a term of sale negotiators acting for the Joint Study Committee were able to extract from National Steel on behalf of those employees who will transfer employment to the new company.

Plaintiffs contend that the terms of sale, if carried out, will result in a prohibited transaction an a violation of fiduciary

duties under ERISA. (*Brunner* Complaint §§ 14, 16, 17, 30; *Sutton* Complaint §§ 186, 211.)

These allegations appear to have several bases. First, one of the Plaintiffs in Sutton asserts that the sole motivation of National Steel in desiring to divest "obligations" to employees. (Affidabit of Willoughby, *Sutton* case, Paper 21.) This allegation is also made in the *Brunner* complaint at § 17. This assertion is contrary to other evidence offered by Plaintiffs in several respects. (*See*, e.g., Letter of Richard Arango, Plaintiffs' Exhibit 9, hearing of April 27, 1983; The Independent News, March 16, 1982, at 1, Plaintiffs' Exhibit 10, hearing of April 27, 1983; Proposals for Acquistion from National Steel, etc., at Section III, Exhibit to amended complaint in *Sutton*, Paper 11; National Steel Corporation Affadavit of Willoughby dated June 28, 1983.)

Second, Plaintiffs assert that "vested inchoate pension benefits" are being "sold" or constitute part of the sale proposed between National Steel and a new company. (See, e.g., *Sutton* case, Paper 22 at § 3.) This assertion is directly contrary to other evidence offered by Plaintiffs. The terms of sale proposed in the agreement in principle announced March 11, 1983, clearly indicate that all assets and liabilities of National Steel's pension that affect any former or present, Weirton Division employee will be segregated and transferred to a separate trust, fund, and/or insurance contract, which will be available only to pay benefits to Weirton Division employees. No "vested inchoate pension benefits" will be sold by National to anyone. The Court recognizes that pension issues are a factor considered by all parties to the proposed sale (*See* pension calculations audit by Towers, Perrin, Forster & Crosby at 1, Plaintiffs' Exhibit 23, hearing of April 27, 1983.), but no pension "obligations" are being transferred from National Steel to the new employee-owned company.

Grant of summary judgment is precluded where there is a genuine dispute as to material facts in issue, even where the assertions of the opposing party are fantastic or highly improb-

able. *Arnestein* v. *Porter*, 154 F.2d 464 (2nd Cir. 1946). Here, it is the opinion of the Court that the two sets of allegation set forth above do not preclude summary judgment. The assertions with regard to National Steel's motivations for divestiture are not disputed since there is only a conflict in the evidence offered by Plaintiffs. No Defendant has offered a factual basis for National's motivation. The assertions with regard to a sale of "vested inchoate pension benefits" is in conflict with credible and uncontroverted facts and must be viewed as a mistake or a frivolous assertion designed merely to avoid summary judgment. *See* Fed. Proc., L.Ed. § 62P550 (1981). A rational interpretation of the evidence presented by Plaintiffs concerning National's motivation would be that avoiding furture pension obligations to employees of the Weirton Division was *one* of the factors motivating National Steel to consider "downsizing" or divesting the Division. In deciding the prohibited transaction and fiduciary duty questions, however, the Court will assume that avoiding future pension obligations was the sole motivation of National, as alleged by Plaintiffs. The Court does not find that any vested pension rights or benefits are being sold.

A third basis for the allegations of prohibited transaction or fiduciary duty violations appears to be the earlier mentioned fear of some Plaintiffs that some pension rights "earned" after transfer to the new company will not be as secure as those "earned" after transter to the new company will not be as secure as those "earned" under National Steel. (Affidavit of Willoughby, *Sutton* case, Paper 21, at §§ 7-9.) (Certain pension benefits earned or accrued as an employee of the new company will be insured by Pension Benefit Guaranty Corporation, although the Court recognizes that some ancillary benefits are not insured.)

A fourth basis for the allegations appear to be the assertion that National Steel has not acted solely in the interests of pension plan beneficiaries and participants. (*See, e.g., Brunner* complaint at § 45; Sutton complaint at § 186.)

Plan fiduciaries must discharge duties with respect to an employee benefit plan solely in the interests of plan participants and beneficiaries. 29 U.S.C. § 1104. The fiduciary must act for the exclusive purpose of providing benefits to beneficiaries and must conduct the affairs of the plan with the care, skill, prudence, and diligence under the circumstances that a prudent man would use. Further the fiduciary must diversify the plan in vestments so as to minimize the risk of large losses, and must act in accordance with the documents and instruments governing the plan insofar as they are consistent with law. *Id.* In addition to the general fiduciary standards set forth in § 1104, certain specific rules relating to defined prohibited transactions are contained in 29 U.S.C. § 1106. A fiduciary is not permitted to have the plan engage in certain direct or indirect transactions with a party in interest. A plan fiduciary is also not permitted to deal with plan assets in his own interest, on behalf of persons whose interests are adverse to the interests of the plan, or receive any personal consideration as a result of plan transactions. *Id.*

According to the terms of the pension agreement, it is clear that National Steel, as plan administrator, is a fiduciary and must carry out duties with regard to plan management in accordance with the fiduciary standards set forth above. An examination of the more extensive corporate plan document together with the Union pension agreement reveals that certain designated National employees administer the plan with respect to payment of benefits, etc., but that the plan is financed through contributions to a trust fund managed and held by a separate entity.

It is th opinion of the Court that the duties with regard to prohibited transactions apply directly to activities affecting the fiscal assets of the plan funds. In other words, for the provisions of 29 U.S.C. § 1106 to apply, there must be a transaction involving the monies, property, or other assets of the fund. *See Donovan* v. *Bierwirth*, 680 F.2d 263, 270 (2nd Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 488 (1983). This notion flows from the very language of the statute itself

("A fiduciary . . . shall not cause the plan to engage in a transaction. . . , etc.) and is supported by the legislative history. *See* H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess., ____, *reprinted in* 1974 U.S. Code, Cong. & Ad. News, 5038, 5087-5089.

The segregation of National Steel pension fund assets relating to Weirton Division employees for transfer to a separate trust account, as contemplated in the terms of sale, is not the type of transaction, in the Court's judgment, which would invoke 29 U.S.C. § 1106. The Court earlier concluded that the assets of a pension fund were not being sold in any manner and neither the assets nor the liabilities of the National Steel pension fund were being transferred to the new company. The Court now finds that the terms of sale under consideration do not require a pension fund to conduct any transaction, prohibited or not prohibited, such as would implicate 29 U.S.C. § 1106.

It would appear that Congressional intent with regard to the more general fiduciary duties of 29 U.S.C. § 1104 also focussed on activities affecting the fiscal assets of the plan. *See* H.R. Rep. No. 93-533, 93rd Cong., 2d Sess., ____, *reprinted in* 1974 U.S. Code Cong. & Ad. News, 4639, 4659; S. Rep. No. 93-127, 93rd Cong., 2d Sess., ____, ____, *Reprinted in* 1974 U.S. Code Cong. & Ad. News, 4838, 4847 and 4864-4865. However, some federal courts have expanded the expression of fiduciary duty beyond transactions involving pension fund assets. Without making a decision which would have predecential value in this jurisdiction, it is the opinion of the Court that this hearing on motion for summary jedgment requires acceptance of a liberal view of ficuciary duties under § 1104 thus giving Plaintiffs' opposition to the motion the broadest possible consideration. The dichotomy between Congressional intent and judicial treatment aside, it is firmly established that the standards for review of fiduciary action when a § 1104 violation is alleged is whether the action is arbitrary and capricious. *See, e.g., Fentron Industries* v. *Nat. Shopmen Pension Fund*, 674 F.2d 1300, 1307 (9th Cir. 1982). Therefore, a violation of § 1104

fiduciary standards must be based on a showing of bad faith or some other indicia of arbitrary and capricious action. *Id.* and *Schulist* v. *Blue Cross of Iowa*, 553 F. Supp. 248 (N.D. Ill. 1982).

The Court's earlier finding that the proposed amendments to the pension agreement, inherent in the terms of sale, do not violate ERISA's vesting and non-forfeitability provisions precludes any contention that a fiduciary duty was breached on the basis that some pension "obligation" will be limited or forfeited if the terms of sale are approved. *Petrella* v. *NL Industries, supra*, 529 F. Supp. at 1366-1367. *Cf. Brug* v. *Pension of Carpenters, etc.*, 669 F.2d 570, 574-576 (9th Cir.), *cert. denied*, ____ U.S. ____, 74 L.Ed.2d 116 (1982) (amending pension eligibility retroactively violates fiduciary duty on facts presented).

Beyond this the remaining contentions are that a fiduciary duty may have been violated because avoiding prospective pension obligations motivated National Steel; that pension rights "earned" under employment with the new company may not be as secure as those "earned" under National Steel, and that National Steel has not acted solely in the interests of pension plan beneficiaries and participants.

The Court believes that ERISA cannot be perceived as requiring federal courts to weigh the potential success of one company as opposed to another when divestiture of a plant through sale to another entity is proposed. Plaintiffs' search for security of pension benefits to be earned in the future is something that is not contemplated by ERISA (beyond insuring certain minimal benefits protected by the Pension Benefit Guaranty Corporation).

Plaintiffs' contentions that fiduciary duties are violated because National was motivated to avoid prospective pension benefits, and that National has not acted solely in the interests of pension plan beneficiaries and participants suffer two fatal defects. First, embracing Plaintiffs' theory *in toto* would preclude *any* company offering pension benefits from amending

the plan in such a way as to limit or eliminate provisions for benefits that are not vested or accrued. As stated before, such is not the state of the law.

Second, Plaintiffs' theory requires a view that *every* corporate decision arguably affecting pension benefits must be made solely in the interests of pension plan beneficiaries and participants. In the context of a decision which limits or eliminates prospective, conditional pension benefits, not required by the vesting and non-forfeitability provisions of ERISA, such is not the case.

The pension agreement specifies that National Steel is the plan administrator and trustee of the pension plan. A "dual loyalty" inherently exists when the employer (which is naturally interested in keeping its costs for pension benefits at a minimum) also acts as administrator or trustee of a pension plan. However, ERISA contemplates and approves of such an arrangement in certain circumstances by providing that one may serve as a fiduciary in addition to being an officer, agent or other representative of an employer. 29 U.S.C. § 1108(c)(3). *See Donovan* v. *Bierwirth*, 538 F. Supp. 463, 468 (E.D.N.Y. 1981), *aff'd as modified (on other grounds)* 680 F.2d 263 (2nd Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 488 (1983). *Flinchbaugh* v. *Chicago Pneumatic Tool Co.*, 531 F. Supp. 110 (W.D. Pa. 1982). When acting on behalf of the pension fund, there is no doubt that a fiduciary having such "dual loyalty" must act solely to benefit participants and beneficiaries. However, itt is the Court's opinion here that when a corporate employer negotiates the terms of sale of a division, whose employees are participants in a pension plan, the negotiations that affect the terms and conditions of future pension benefits (at least those that are not protected by ERISA's vesting and non-forfeitability provisions), do not implicate fiduciary duties as to the pension fund. Such negotiations are distinct from actually administering a plan and conducting transactions affecting the monies and property of the plan's fund. In other words, the mere fact that a company has named itself as pension plan administrator or trustee does not restrict it from

persuing reasonable business behavior in negotiations concerning pension benefits not otherwise affected by the requirements of ERISA. *See N.L.R.B.* v. *Amax Coal Co.*, 453 U.S. 322, 333 n. 16 (1981). When the terms of the pension agreement are negotiated by a labor organization and the employer and ultimately controlled by a collectively bargainined agreement, as here, the distinction between administering the pension program (under a fidiciary duty) and creating or amending the program through negotiations is even more clear. *See UMWA Health & Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982).[2]

Even if a fiduciary duty were to be imposed on a corporate employer in such a situation, the Court would have to find that no duty was violated here. The Court earlier concluded that the proposed amendments do not deprive any Plaintiff of a vested or non-forfeitable benefit. The Court also concluded the amendments proposed are reasonable under the circumstances. Finally, the Court would conclude that since all employees of the Weirton Division (not just those covered by the pension agreement at issue) would be equally affected by the proposed changes, there is no discrimination. On the facts presented here, the action of National Steel in negotiation the terms of sale that affect ancillary pension benefits was neither arbitary or capricious, nor has there been a showing of bad faith.

In conclusion, the Court finds that the terms of sale proposed to amend the 70/80 and rule of 65 retirement provisions of the pension agreement between National Steel and the Indepen-

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[2] As earlier mentioned, the corporate pension agreement specifies that the pension plan is administered by a committee of designated National employees and that most of the assets of the plan are held by a trust fund, managed and held by a separate entity. It has occurred to the Court that since the people actually administering the pension fund may not be at all involved in the negotiations for the sale of the Weirton Division, no breach of fiduciary duty under 29 U.S.C. § 1104 would arise because of a division of labor within the corporation. However, the issues before the Court were framed to test National's participation in the events surrounding the proposed sale as a corporate entity.

dent Steelworkers Union do not violate provisions of ERISA relating to vesting, accrued benefits, or non-forfeitability; do not violate provisions of ERISA relating to prohibited transactions; do not violate provisions of ERISA relating to fiduciary duties imposed upon National Steel or the pension plan, and od not violate provisions of the existing pension or collective bargaining agreements. The Court earlier found that the terms of sale do not violate other provisions of labor law.

SEVERANCE PAY ISSUES

The current collective bargaining agreement between National Steel Corporation, Weirton Steel Division, and Defendant Union and its members who are production, maintenance, and hourly-rated plant clerical employees includes a provision for severance pay. In brief, a severance allowance is payable to employees who have accumulated three or more years of service when the company permanently closes a department or substantial portion thereof and the employment of individuals is terminated, either directly or indirectly, as a result of the department closure. There are exceptions to the severance allowance if the employee accepts an offer of a job in another department or is offered a job of the same job class in the same department or requests a lower job class job in the same department, etc. Payment of severance benefits in certain circumstances may affect other benefits from the company. (E.g., Payment of severance allowance may be deducted from pension benefits.)

In the *Brunner* complaint, it is alleged that the agreement that the sale of Weirton Division to a newly-formed, employee-owned corporation will not trigger Defendant National Steel's obligation to make severance payments to employees is either a breach of Defendant Union's fiduciary obligations or duty of fair representation. (Complaint §§ 44, 45, 46.) The amended complaint in the *Sutton* matter does not mention severance pay until the prayer for relief. It is therefore difficult, perhaps impossible, to determine the basis for challenge in that civil action. Based upon the pleadings, the motion for summary

judgment under consideration, and other matters of record, the severance pay issue may be properly stated as follows: Whether a sale by an existing employer to another employer, without more, should trigger an obligation of the existing employer to pay severance benefits. Since both the *Brunner* and *Sutton* complaints state rather sweeping allegations of violations of ERISA, the Court will consider the issue both as to ERISA and the labor law duties of unions.

In general, a severance allowance is payment by an employer to an employee on termination of the employee's employment. Black's Law Dictionary, 1232 (5th Ed. 1979). Such payment is beyond wages and is usually designed to ease the employee's financial burdens while looking for a new job. *See Owens* v. *Press Publishing Co.*, 20 N.J. 537, 120 A.2d 442 91956).

Though not a retirement benefit, severance pay does come within the reach of ERISA as an "employee welfare benefit plan." 29 U.S.C. §§ 1002(1) (citing 29 U.S.C. § 186 and the benefits described therein), 1002(2)(B). Though the "vesting" provisions of ERISA (which mainly apply to pension plans) do not apply, other protective provisions of ERISA do apply, such as the safeguards against discrimination, 29 U.S.C. § 1140, and violation of fiduciary duties, 29 U.S.C. § 1104. *Calhoun* v. *Flastaff Brewing Co.*, 478 F. Supp. 357 (E.D. Mo. 1979). Federal courts frequently look to the contract language of severance pay benefits as a guide in determining whether violations have occurred. *See, e.g., Donnelly* v. *Aetna Life Ins. Co.*, 465 F. Supp. 696 (E.D. Pa. 1979).

Unlike some severance pay provisions in collective bargaining agreements, the one at issue here does not set forth a purpose. Instead, Article XIV of the collective bargaining agreement merely sets forth conditions, eligibility, methods of determining the allowance, and other adminitrative provisions. However, one can easily determine that the benefit is designed to aid those whose employment is terminated.

Both the *Brunner* and *Sutton* actions challenge the proposed terms of sale between National Steel and a new employee-

owned corporation. Thus the issue here is limited to whether the sale, without more, should trigger severance benefits. The Court is satisfied that the proposal to amend the severance benefit provisions of the collective bargaining agreement to preclude payment of severance allowances solely on the basis of the transfer of ownership violates neither ERISA nor the terms of the agreement as currently written. Simply put, the fundamental bases for this benefit are not necessarily put into play by such a transfer; namely, the permanent closure of a department or substantial portion thereof, and the termination of employment as a direct or indirect result.

The testimony adduced at hearings thus far and several of the documents submitted as exhibits lead the Court to believe that all, or a substantial majority of all, the active employees of National's Weirton Steel Division will be offered an opportunity to go to work for the proposed employee-owned company. It can be said with certainty that any employee of National Steel who becomes employed by the new employer following the transition of ownership is not entitled to a severance allowance under the contract or under ERISA. *Pinto* v. *Zenith Radio Corp.*, 480 F. Supp. 361 (N.D. Ill. 1979), *aff'd*, 618 F.2d 110 (7th Cir. 1980) (table). Also, the agreement in principle containing the terms of sale from National Steel states that National will remain liable for outstanding and unrevealed severance pay claims. To say that any present employee of National at Weirton, either active or on layoff, will have a valid severance allowance claim that will be denied is purely speculative and it cannot be said that the existing Plaintiffs in *Sutton* and *Brunner* would be proper parties to such claims.

In large measure, the reasoning of the Court with regard to prohibited transactions and other fiduciary duties of National Steel under ERISA for pension benefit issues apply equally to severance pay issues. Because no activity affecting the fiscal assets of a welfare benefit plan is implicated with the proposed amendments to severance allowance provisions in the agreement, 29 U.S.C. § 1106 (prohibited transactions) cannot apply. Indeed, the funding requirements of ERISA do not even apply

to employee welfare benefits plans such as a severance pay benefit, 29 U.S.C. § 1081, and there is no "fund" or group of assets subject to the prohibited transaction provisions. Because severance pay benefits are not subject to ERISA's visiting and non-forfeitability requirements, there can be no breach of fiduciary duty on the part of any party for proposing a limit to such benefits on the basis that some "vested" right is curtailed. The distinction between a corporate fiduciary duty when administering a benefit plan and corporate activities in connection with negotiating changes in a benefit plan which were enunciated with regard to pension issues is applicable to this discussion of severance pay benefits. Therefore, there has been no violation of an ERISA-based fiduciary duty with regard to the proposed severance pay amendment.

In conclusion, the Court finds that the terms of sale proposed to amend the severance allowance provisions of the collective bargaining agreement between National Steel and the Independent Steelworkers Union do not violate provisions of ERISA relating to vested, accrued benefits or non-forfeitability; do not violate provisions of ERISA relating to prohibited transactions; do not violate provisions of ERISA relating to fiduciary duties, and do not violate provisions of the existing collective bargaining agreement. The Court earlier found that the terms of sale do not violate other provisions of labor law.

THE MOTION TO DELAY CONSIDERATION

The Counsel for Plaintiffs in these cases have filed a motion to delay consideration of National's motion for (partial) summary judgment until further discovery is completed.

Because the ruling of the Court is limited to issues surrounding the agreement in principle, as amended, which announced the terms of sale between National and a proposed company; and because the Court, for purposes of this Opinion and Order, has considered Plaintiffs' characterization of National's motivation for sale of the Weirton Division as true, there is no need to delay a ruling on the issues as framed. Therefore, Plaintiffs' motion will be denied in part.

There are other issues raised by the complaints not reached herein. These include claims that additional pension supplements have been given to certain employees upon demand, but denied to Plaintiffs *(Sutton* complaint § 190), that Defendant Independent Steelworkers Union has acted through unlawfully elected officers *(Sutton* complaint § 210), and the earlier mentioned claims embodied in charges of unfair labor practices pending before the NLRB. As to the remaining issues, further discovery may be necessary. Provided the discovery is accomplished within the framework established by the Federal Rules of Civil Procedure and the Local Rules of this Court, Plaintiffs' motion will be granted in part.

ORDER

The foregoing constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure. Upon the reasoning and conclusions herein, it is

ORDERED that the motion of Defendant National Steel Corporation for partial summary judgment on the issues earlier delineated is GRANTED. It is further

ORDERED that the motion of Plaintiffs' to delay consideration of National's motion for summary judgment is DENIED in part, and GRANTED in part, as earlier delineated.

Additionally, there are many other issues raised and suggested by the complaints in *Brunner* and *Sutton* which are not resolved to date. The Court will look to counsel for the various parties to begin proceedings which will mature these matters for speedy disposition.

ENTER: July 8th, 1983.

/s/ _____
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. Attest: Thomas F. Stafford, Clerk, U.S. District Court, Northern District of West Virginia.

By: _____
Clerk of the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 83-0035-W

EUGENE R. SUTTON, *et als.*,
Plaintiffs

v.

WEIRTON STEEL DIVISION OF NATIONAL STEEL COPRORATION; *et als*,
Defendants.

Civil Action No. 83-0040-W

GERALD W. BRUNNNER *et als.*,
Plaintiffs

v.

NATIONAL STEEL CORPORATION, *et als*,
Defendants.

U.S. DISTRICT COURT
FIELD AT WHEELING, W. VA.

Sep. 6, 1983

THOMAS F. STAFFORD
Clerk

ORDER OF CORRECTION

To correct certain errors occurring in the Memorandum Opinion and Order dated July 8, 1983, which was entered in these civil actions, it is

ORDERED that:

(1) On Page 16, the first typewritten characters on the page be changed from 70/70 retirement to 70/80 retirement.

(2) On Page 19, in the second full paragraph appearing on the page, the word "bemefot" be deleted completely.

(3) On Page 24, the last line in the second full paragraph appearing on the page, Affidavit of Willoughby dated June 28, 1983), be changed to news release dated March 2, and excerpt from 1982 Annual Report, Exhibits to Affidavit of Willoughby dated June 28, 1983, *Sutton* case, Paper 29A).

ENTER: September 1st, 1983.

/s/ _____
United States District Judge

I hereby certify that the annexed instrument is a true and coorect copy of the original on file in my office. Attest: Thomas F. Stafford, Clerk, U.S. District Court, Northern District of West Virginia.

By: _____
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 80-0036-W

EDWARD DHAYER, *et als*,
Petitioners,

v.

WEIRTON STEEL DIVISION OF NATIONAL STEEL CORPORATION; and INDEPENDENT STEELWORKERS UNION,
Defendants.

U.S. DISTRICT COURT
FILED AT WHEELING, W. VA.

SEP. 12 1983

THOMAS F. STAFFORD
Clerk

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MEMORANDUM OPINION AND ORDER

This civil action concerns Defendant National Steel's Weirton Division (National) and activities in connection with a proposed employee buy-out plan. Although there are quite a few actions on this Court's docket having some factual connection with the proposed employee buy-out plan, this civil action has moved in procedural tandem with two other actions filed within weeks of this action. They are *Sutton, et al.* v. *National Steel, et al.*, C.A. No. 83-35-W (filed March 30, 1983) and *Brunner, et al.* v. *National Steel, et al.*, C.A. No. 83-40-W (filed Apr. 13, 1983). The Plaintiffs in both *Brunner* and *Sutton* are members of the International Steelworkers Union (Union). It appears that all Plaintiffs in this action are salaried employees at Weirton Division, and are not Union members. These

three civil actions largely concern employee benefit plan questions — severance pay and early retirement pensions.

Pending before the Court are a motion to dismiss filed by Defendant Union, an amended motion for summary judgment propounded by Defendant National, and a motion to defer ruling filed by Plaintiffs.

The record in this action includes the pleadings and exhibits thereto, and various affidavits offered in support of and in opposition to these motions. Believing that case law developing the common law principles of judicial notice and Rule 201, Federal Rules of Evidence, authorizes, indeed, mandates such, the Court will also consider testimony and exhibits adduced at hearings conducted on April 13, 1983, at Elkins, and on April 27-29, at Wheeling, in the earlier-mentioned companion matters, *Brunner* and *Sutton*. *See Kinnett Dairies* v. *Farrow*, 580 F.2d 1260, 1277 n. 33 (5th Cir. 1978). From these matters of record, the Court finds the following facts are significant to the issues to be decided:

The Weirton Division of National Steel is the single largest private sector employer in the State of West Virginia. At one time, shortly after World War II, the Division had 16,000 workers, but the recent market for steel produced in the United States has reduced employment to some 11,000 in 1980, and about 7,000 currently.

In March, 1982, National Steel announced it would no longer make significant capital investment in its Weirton Division facilities, and that those facilities would be "downsized" over a period of time with a resulting level of employment of 1,200 to 2,000 workers in the late 1980's. The President of National Steel indicated the announcement was not an attempt to win labor cost concessions, but reflected the business decision of National to place its investment capital in other areas. In addition to National's announced intention to downsize the Weirton facilities, the options for the Division seemed to include finding a buyer for the Weirton mill who would be interested in future steel production or to devise a plan for an

employee buy-out. National's management indicated a willingness to explore either of these options.

On the day of National's announcement, the International Steelworkers Union announced its intention to work with Weirton Division management to study the possibilities of employee buy-out, and, if feasible, to open negotiations with National Steel. The Weirton Joint Study Committee was incorporated to study the employee buy-out option and coordinated related efforts. The Committee's board of directors consists of five representatives of the Weirton Division management team, twenty-one representatives of the International Steelworkers Union, and three representatives of the Independent Guard Union. Funds for the various activities of this Committee were raised from the unions involved, community donations, grants from the State of West Virginia, and other sources.

In April, 1982, after a competitive selection process, the Joint Study Committee hired the consulting firm of McKinsey & Co. to conduct a feasibility study on the economic viability of an independent, employee-owned Weirton Steel company. In July, 1982, McKinsey & Co. released a report concluding that such a venture could be successful, but only if labor and production costs were reduced and if substantial capital improvements could be effected over a period of ten years.

The employee buy-out option preferred by the Joint Study Committee and the one pursued includes an Employee Stock Ownership Plan (ESOP), which will allow the new employee-owned corporation to borrow funds to finance the sale from National and permit employees who satisfy minimum hours of work to earn shares of stock as initial loans are paid. An ESOP presents an opportunity for significant tax savings for the proposed company under the Internal Revenue Code.

As the employee buy-out plan progressed, the Joint Study Committee hired other consultants to assist in formulating various complex aspects of the procedure. These include the law firm of Ludwig & Curtis, of San Francisco, to advise on the

structure of an ESOP; the law firm of Wilkie, Farr & Gallagher, of New York, to represent the Committee and the proposed new corporation in negotiations with National Steel regarding acquisition of the Weirton Division assets; the investment banking firm of Lazard Freres & Co., of New York, to assist with all questions of finance; the accounting firm of Towers, Perrin, Foster & Crosby, of Pittsburgh, to conduct an audit of National's pension plans for Weirton Division employees. All of these consulting firms, and others involved in the study, enjoy national or international reputations for expertise in the fields for which they were hired.

On March 11, 1983, National Steel and Wilkie, Farr & Gallagher (the law firm hired to negotiate a sale of weirton division assets for the Joint Study Committee) announced an agreement in principle for the terms of sale from National to Weirton Steel Corporation (the proposed employee-owned company). The agreement has been amended by an addendum announced April 8, 1983. During 1983, Wilkie, Farr & Gallagher formed a "shell" corporation in the State of Delaware in anticipation of the success of the employee buy-out venture.

Should the employee buy-out be implemented, Weirton Steel Corporation will succeed National Steel's Weirton Division as the largest private-sector employer in West Virginia. It will also be one of the largest corporations in the United States and *the* largest employee-owned corporation in the country. As all the parties are aware, the venture (like any large corporate undertaking) is not without risk. Consultants for the Joint Study Committee believe success is possible, given certain economic and social circumstances. However, it is realized that such expressions are only educated forecasts. Long term success depends upon the general economic trends, as well as trends specifically involving markets for the products produced at the Weirton facility.

In order to carry out the provisions of the agreement in principle, as amended, and to implement the employee buy-out, members of the Independent Steelworkers Union and the

Independent Guard Union must conduct an election, now scheduled for a day certain, to modify existing collective bargaining agreements with National Steel. Both the mechanisms of the employee buy-out and the implications of such a venture are extremely complex. In order to inform union memberships of the various aspects of the proposal, the Joint Study Committee and its consultants have produced a "disclosure document" which they urge reveals all of the facts necessary to an understanding of the venture and its ramifications for the employees of the new Weirton Steel company.

Testimony adduced at hearings thus far and several of the documents submitted as exhibits lead the Court to believe that all, or a substantial majority of all, the active employees of National's Weirton Steel Division will be offered an opportunity to work for the proposed employee-owned company. It is recognized that the McKinsey & Co. feasibility study has recommended reductions in the entire work force, and considerable reductions in salaried workers to more closely match the manpower ratios of competing steel manufacturers; however, it is the Court's understanding that the reductions are to be reached through natural attrition.

Should the members of the two unions vote to approve proposed collective bargaining agreement modifications, each Weirton employee — union and non-union — will then make another important decision: whether to go to work for the new company. For some, this decision will be made more difficult because of the opportunity for immediate retirement from National with totally predictable pension and other benefits for the future. The terms of sale, as amended, include provisions that employees meeting the chronological age and years of service requirements for some of the types of retirement in the applicable pension plan may elect to retire five days after the union votes referred to above. Such election to retire will be effective as of April 30, 1983, one day before May 1, 1983, the accounting date established to be effective date of transfer of ownership.

All workers, whether they choose to work for the new company or not, will retain the pension benefits earned through service with National Steel prior to the transfer of ownership. Pension rights earned and accrued after the transfer of ownership (with the exception of certain "safety net" features to be discussed below) will be the responsibility of the new employee-owned company. Plaintiffs express the concern that pension rights earned after transfer to the new company will not be as secure as those earned under National, which has a proven record of corporate stability.

The pension plan for salaried, non-union employees at National Steel's Weirton Division is referred to in the record as National Steel Corporation Retirement Program, or Plan 001. (Exhibit A, attached to the Affidavit, dated May 31, 1983, of John A. McCreary, in support of National's Motion for Summary Judgment.) In limited circumstances, salaried, non-union Weirton Division employees may receive severance pay upon separation from employment with National. National's severance benefits provisions are set forth in the Weirton Division policy on termination of exempt salaried employees. (Exhibit A, attached to the affidavit of John A. McCreary, given June 21, 1983.)

STATEMENT OF THE ISSUES

This litigation focuses on the propriety of terms of sale regarding pension and severance pay benefits for salaries Weirton Division employees, who are not union members. Defendant National Steel filed a proposed statement of the issues and requested expeditious consideration of them. This was followed by the motion for summary judgment, as amended. Counsel for Plaintiffs have also filed a statement of the issues. The Court believes the issues presented by National's motion are fair statements of the major claims of the complaint, however, not every issue raised in the complaint is included within the motion for summary judgment. Therefore, the Court views National's motion as a motion for partial summary judgment. In contrast, the Court views Defendant

Union's motion to dismiss as one requesting complete relief (as to the Union).

In general, the motion for summary judgment presents the legal issue of whether the terms of sale, which are proposed to amend existing pension or other emplyee welfare benefit plans, deprive any Plaintiff of a right or benefit buaranteed by law. The terms of sale (the earlier-mentioned agreement in principle announced March 11, and amended April 8, 1983) specify that the transfer of ownership, without more, will neither trigger entitlements to 70/80 or rule of 65 retirement under the applicable pension plan nor establish the basis for severance allowance payments. The terms also limit eligibility to 70/80 and rule of 65 retirements after the transfer.

The complaint charges the amendments that will be made in accordance with the terms of sale violate various provisions of the Employee Retirement Income Security Act (ERISA) and the terms of the applicable pension plan. In addition, the complaint charges both Defendants with conspiracy, discrimination, bad faith breach of an implied covenant of fair dealing, deprivation of property without due process of law, deprivation of rights under a collective bargaining agreement, and other acts and omissions.

From an examination of the pleadings, the motions of Defendants, and other matters of record, the Court defines the following specific issues for resolution:

1. Whether the terms of sale proposed to amend 70/80 and rule of 65 retirement provisions of the National Steel pension agreement violates:

a. provisions of ERISA relating to prohibited transactions;

b. provisions of ERISA relating to fiduciary duties imposed upon National Steel:

c. provisions of ERISA relating to vested, accrued benefits or non-forfeitable benefits;

d. provisions of the pension plan.

2. Whether the terms of sale proposed to amend the National Steel policy on termination of exempt salaried employees violates:

a. provisions of ERISA relating to prohibited transactions;

b. provisions of ERISA relating to fiduciary duties imposed upon National Steel;

c. provisions of ERISA relating to vested, accrued benefits or non-forfeitable benefits;

d. provisions of the policy itself.

3. Whether the "First Cause of Action" of the complaint states a claim upon which relief can be granted against Defendant Union.

4. Whether the court has subject matter jurisdiction over any of the claims asserted against Defendant Union in the "Second Cause of Action" of the complaint.

At the risk of being repetitive, the Court would note a few matters not considered in this decision. No issue concerning pension benefits provided by the proposed, employee-owned company is decided (nor is one raised by this litigation). No issue concerning any individual Plaintiff's immediate right to an early retirement or severance pay benefit is decided; instead, the Court limits its ruling to the effect of the proposed amendments to the pension plan and severance pay policy for salaried, non-union personnel as a group.

PENSION BENEFIT ISSUES

Under the existing pension plan between National and its salaried, non-union employees at the Weirton Division, there appears to be eight distinct types of retirement, or methods of

determining eligibility for a pension.[1] For normal retirement, 62/15 retirement, 30-year retirement, and 60/15 retirement, the plan participant becomes eligible simply through achievement of certain chronological age and years of service factors. Participants with 15 years of service who become permanently incapacitated, as defined in the plan, are eligible for permanent incapacity retirement. Persons with 10 years of service whose continuous service is broken for any reason are eligible to receive a deferred vested pension after reaching age 62 or 65, depending on the participant's age at the time service was broken. The remaining types of retirement, rule of 65 retirement and 70/80 retirement, are the subject of the pension issues in this litigation. Age and years of service are aspects included in determining eligibility.

The factors are as follows:

> 6. *70/80 Retirement.* Any Participant who has not attained the age of 62 years and who shall have had at least 15 years of Service and (i) shall have attained the age of 55 years and whose combined age and years of Service shall equal 70 or more, or (ii) whose combined age and years of Service shall equal 80 or more, and
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> (a) whose Service is broken by reason of a permanent shutdown of a plant, department or subdivision thereof or by reason of a layoff or physical disability, or
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> (b) whose Service is not broken and who is absent freom work because of physical disability or a layoff and whose return to active employment is declared unlikely by the Company, or
>
> (c) who considers that it would be in his interest to retire and the Company considers that such retirement

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[1] Although the Plaintiffs have appended a copy of a summary of this plan to their complaint, the Court relies on the language of the full corporate pension plan document for all purposes having to do with Defendants' motions. (Exhibit A, affidavit of John A. McCreary, Vice President, Human Resources of National Steel, given May 31, 1983. National Steel Corporation Retirement Program, effective January 1, 1962, as amended to and including August 1, 1980.)

would likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions,

shall be eligible to retire on or after August 1, 1980 and shall upon his retirement (hereinafter "70/80 retirement") be eligible for a pension.

7. *Rule-of-65 Retirement.* Any Participant (i) who shall have had at least 20 years of Service as of his last day worked, (ii) who has not attained the age of 55 years, and (iii) whose combined age and years of Service shall equal 65 or more but less than 80, and

(a) whose Service is broken by reason of a layoff or disability, or

(b) whose Service is not broken and who is absent from work by reason of a physical disability or a layoff and whose return to active employment is declared unlikely by the Company, or

(c) who consider that it would be in his interest to retire, and the Company considers that such retirement would likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions, and

who has not been offered suitable long-term employment shall be eligible to retire on or after August 1, 1980, and shall upon his retirement (hereinafter "rule-of-65 retirement") be eligible for a pension; provided, however, that if at the time of application for retirement the Company has not yet determined whether the Participant will be offered suitable long-term employment, the Participant will not be eligible to retire until the earlier of the date on which the Participant incurs a break in Service.

In addition, among the provisions in the plan for calculating the amount of pension under the various types of retirement, increased pensions are described for 70/80 and rule of 65 (and permanent incapacity). With certain exceptions, the monthly amount determined under the regular rules is now apparently increased by $400.00 for beneficiaries of 70/80 and rule of 65 retirement.

The terms of sale from National to the employee-owned company will require a number of changes in the existing pension agreement. However, it is apparent that no change will be effected to decrease any accrued benefit, determined under the existing plan, and National Steel shall remain liable for all accrued benefits "earned" prior to the closing date. Under the terms of sale, National will segregate the liabilities and assets of the existing fund attributable to Weirton Division employees (the existing fund covers employees at other National Steel divisions in addition to Weirton) and establish a separate trust fund and insurance contract which will only be available to pay benefits to Weirton Division employees, including those already retired, those transferring to the new company, and those on layoff status.

Those employees of National Steel who remain working under the new employee-owned company will, in effect, look to both National and the new company for pension benefits upon retirement. The terms of sale provide a method of calculating benefits payable by each company, which is based on each individual's years of service with each employer.

Especially pertinent to this litigation are the terms which modify the eligibility for 70/80 retirement and rule of 65 retirement and the increased pension benefits for these types of retirement. For transferred employees only (those who were employees of National and who choose to become employees of the new company), conditions giving rise to eligibility for 70/80 and rule of 65 retirement will be limited to a permanent shutdown of the new company's operations which occurs within five years of the transfer of ownership date for accounting purposes (May 1, 1983). The increased pension ($400 per month) will only be payable if a permanent shutdown occurs. The terms of sale also require that the pension plan and other benefit plans be modified to reflect the fact that the sale and transfer of ownership does not constitute a shutdown for purposes of pension or retirement benefits or severance allowance. (Thus, the sale and transfer of ownership, without more, will not trigger eligibility to any of these benefit programs.)

It is not per se unlawful to alter a pension plan with respect to prospective benefits, provided the change doesn't violate other ERISA requirements. *See Fentron Industries* v. *Nat. Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982). The Court must decide whether the amendments proposed to 70/80 retirement and rule of 65 retirement violate the Act's minimum requirements for vesting, accrued benefits, or non-forfeitability.

In general terms, the labor law provisions of ERISA provide a system of safeguards designed to strengthen private employee pension and welfare benefit plans. (The provisions of ERISA made part of the Internal Revenue Code are generally not at issue here.) ERISA does not require an employer to offer any type of benefit, but, if it does so, the plan must comply with the minimum requirements of the Act.

With regard to pensions, ERISA imposes no obligation on a plan to pay benefits before an employee reaches normal retirement age. Any right to earlier benefits must be found in the individual agreement. *Fine* v. *Semet*, 699 F.2d 1091, 1093 (11th Cir. 1983) (citing *Pompano* v. *Michael Schiavone & Sons*, 680 F.2d 911 (2nd Cir.), *cert. denied*, ___ U.S. ___, 74 L.Ed.2d 607 (1982). Under ERISA, normal retirement age means the earlier of normal retirement age under the plan or the later of the time the participant attains age 65 or reaches the 10th anniversary of participation in the plan. 29 U.S.C. § 1002(24). The plan in issue defines normal retirement age as 65.

An accrued benefit is the interest in the plan to which a participant has become entitled. Am. Jur. 2d *Pension Reform Act* § 73 (1975). In the case of a defined plan, it means an individual's rights to a retirement benefit determined under the plan, expressed in the form of an annual benefit starting at *normal retirement age*. 29 U.S.C. § 1002(23)(A) (emphasis supplied). A non-forfeitable pension benefit or right is a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, *which is unconditional*,

and which is legally enforceable against the plan. 29 U.S.C. § 1002(19) (emphasis supplied). In sum, ERISA is designed to protect plan benefits for normal age retirement which are unconditional.

Accrued benefits under ERISA are not intended to include such things as conditional benefits, premiums for medical and life insurance payable as a lump sum, or the value of the right to receive early retirement benefits. *See* H.R. Report No. 93-807, 93rd Cong., 2d Sess. ____, *reprinted in* 1974 U.S. Code, Cong. & Ad. News 4670, 4726. Am. Jur. 2d *Pension Reform Act* § 73 (1975). *See generally*, *Petrella* v. *NL Industries*, 529 F. Supp. 1357, 1365-1366 (D.N.J. 1982). These are ancillary benefits which may be amended or deleted without violating ERISA. *Id.*

An examination of the eligibility requirements for 70/80 and rule of 65 retirement reveals they are conditional and in the nature of early retirement benefits and cannot be considered non-forfeitable or as an accured benefit. *Capocci* v. *General Motors Corp.*, 444 F. Supp. 1306, 1307-1308 (D. Hawaii 1978). Since the increased $400.00 per month pension payment is conditioned upon eligibility for 70/80 or rule of 65 retirement, it cannot be considered non-forfeitable. The Court has considered the potential applicability of 29 U.S.C. § 1056(a) and finds that it does not require a contrary mandate on the issues raised here.

Under ERISA, "vesting" is a term that is obviously tied to the term "accrued benefit." To prevent any possible misunderstanding of the Court's language in the previous paragraph, the proposed terms of sale with regard to 70/80 and rule of 65 retirement and the increased pension payments thereunder do not violate any minimum vesting standards under ERISA. This is because the terms of sale affecting pensions do not distrub the normal retirement benefit or the deferred vested pension benefit, *See* 29 U.S.C. § 1053, and since the terms of sale provide that all accrued benefits shall become vested upon transfer of ownership. *See* 26 U.S.C. s411(d)(3).

In short, Congress did not intend to impose upon a plan a requirement that any benefits be payable before reaching age 65 or the normal retirement age (65 in this case) under the plan. *Riley* v. *MEBA Pension Trust*, 452 F. Supp. 117, 120 (S.D. N.Y.) *aff'd*, 586 F.2d 968 (2nd Cir. 1978).

Plaintiffs claim the amendments to the pension plan will violate the basic terms of the plan itself. All pension plans subject to ERISA must include a provision for plan amendment. 29 U.S.C. § 1102(b). National's power to amend or modify the program within certain bounds is set forth in Section VIII of the plan. It cannot be said that amendments to the pension plan are per se violations of ERISA or per se violations of the plan as a contract; both the Act and the plan itself anticipate changes and modifications.

Plaintiff's allegation that the amendments violate the plan itself would seem to assume that all provisions in the agreement are "written in stone," and never subject to change. Such is not sound law. A proposed amendment would only violate the language of the pension plan when a particular individual's unconditioned rights are affected or when the amendment is unreasonable. *Rochester Corp.* v. *Rochester*, 450 F.2d 118 (4th Cir. 1971). In other contexts, but in cases arising under ERISA, the Supreme Court has said, "it is the claim to the benefit rather than the benefit itself that must be 'unconditional' and 'legally enforceable against the plan.' " *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 512 (1981). *Nachman Corp.* v. *P.B.G.C.*, 446 U.S. 359, 371 (1980). Since the Court has earlier found that any rights a particular Plaintiff might have under 70/80 and rule of 65 retirement are contingent and conditional, it must also find that a proposed amendment to the provisions for these types of retirement do not violate the terms of the agreement itself.

Further, the proposed changes must be seen as reasonable. Here, the amendments are proposed in the context of an anticipated change in ownership where the majority of active workers will immediaely become employees of the new owner. Since

a "shutdown" of National's Weirton Division is not anticipated, in any sense, it is reasonable to propose amendments which would clarify existing language regarding shutdown and suitable long-term employment. The present eligibility for 70/80 and rule of 65 retirement conditions also include such things as layoff, disability, and other matters involving the discretion of the employer. Since the proposed amendments only affect a situation that would arise after a transfer of ownership, the Court must find that eliminating such conditions are reasonable since they are properly the concern of the relationship between the new employer and the employee.

The terms of sale include what has been labeled by counsel as a "safety net" feature. In effect, National will continue to offer its former employees 70/80 and rule of 65 retirements if, and only if, the new company should suffer a shut-down of substantially all of its facilities within five years of the closing or transfer date. National Steel was not required to extend this "safety net" feature to its former employees under ERISA. This is a term of sale that negotiators acting on behalf of the new company were able to extract from National.

Plaintiffs contend that the terms of sale, if carried out, will result in a prohibited transaction and a violation of fiduciary duties under ERISA. These allegations appear to have several bases. First, it is claimed that the sole motivation of National Steel in desiring to divest or "downsize" the Weirton Division is to avoid unfunded pension "obligations" to employees. (Complaint, § 53.) Plaintiffs also assert that "vested, inchoate pension benefits" are being "sold" or constitute part of the sale proposed between National Steel and a new company. (See, e.g., Plaintiff's Submission of Issues, §§ 3, 7, 8.) A third basis is the earlier mentioned fear of some Weirton workers that some pension rights "earned" after transfer to the new company will not be as secure as those "earned" under National Steel. *(See* Affidavit of William W. Willoughby, given May 25, 1983, in opposition to motion for Summary Judgment, § 9.) Finally, it is asserted that National Steel has not acted solely in the interests of pension plan beneficiaries and participants. (See, e.g., Complaint § 46, 53.)

The assertion concerning the motivation of National Steel is contrary to a considerable mass of evidence offered by counsel for the *Dhayer* Plaintiffs in the *Sutton* case. *(See, e.g.*, Letter of Richard Arango, Plaintiffs' Exhibit 9, hearing of April 27, 1983; The Independent News, March 16, 1982, at 1, Plaintiffs' Exhibit 10, hearing of April 27, 1983.) The claim that pension benefits are being sold directly conflicts with the very document Plaintiffs challenge in this civil action. The terms of sale proposed in the agreement in principle announced March 11, 1983, clearly indicate that all assets and liabilities of National Steel's pension plan that affect any former or present Weirton Division employee will be segregated and transferred to a separate trust, fund, and/or insurance contract, which will be available only to pay benefits to Weirton Division employees. (Proposals for Acquisition from National Steel, etc., Section III, A and D, Exhibit to Complaint.)

It is recognized that grant of summary judgment is precluded where there is a genuine dispute as to material facts in issue, even where the assertions of the opposing party are fantastic or highly improbable. *Arnstein* v. *Porter*, 154 F.2d 464 (2nd Cir. 1946). In this action the Court is of the opinion that the two sets of assertions set forth above do not preclude summary judgment.

The assertions with regard to National Steel's motivations for divesture are not disputed. There is only a conflict in the evidence offered by Plaintiffs. No Defendant has offered a factual basis for National's motivation, and, for the purposes of expediting its summary judgment motion, Defendant National has accepted Plaintiffs' position with regard to motivation. *(See* Defendants motion for Protective Order, etc., § 4.) A rational interpretation of the evidence presented by Plaintiffs here and in *Brunner* and *Sutton* would be that avoiding future pension obligations to employees of the Weirton Division was *one* of the factors motivating National Steel to consider "downsizing" or divesting the Division. However, in resolving the issues of alleged prohibited transaction and fiduciary duty questions, the Court will assume that avoiding future pension

obligations was the sole motivation of National, as alleged by Plaintiffs.

The assertions with regard to a sale of "vested inchoate pension benefits" is in conflict with credible and uncontroverted facts and must be viewed as a mistake or frivolous assertion designed merely to avoid summary judgment. *See* Fed. Proc., L.Ed. § 62:550 (1981). The terms of sale which both Plaintiffs and Defendants agree will control the transfer of ownership clearly indicates that no "vested inchoate pension benefits" will be sold by National Steel to anyone. The Court recognizes that pension issues are a factor considered by all parties to the proposed sale *(See* Pension calculations audit by Towers, Perrin, Forster, & Crosby at 1, *Sutton* Plaintiffs' Exhibit 23, hearing of April 27, 1983), but no pension "obligations" are being transferred from National Steel to the new employee-owned company.

With regard to the fear of some workers that pension rights "earned" under employment with the new company may not be as secure as those "earned" under National Steel, the Court believes that ERISA cannot be perceived as requiring federal courts to weigh the potential success of one company as opposed to another when divestiture of a plant through sale to another entity is proposed. Plaintiffs' search for security of pension benefits to be earned (to become vested or accrued) at some point in the future is something that is not contemplated by ERISA. (Beyond insuring certain minimal benefits protected by the Pension Benefit Guaranty Corporation).

In summary, and in context with the limited legal issues before the Court, Plaintiffs' alleged prohibited transaction and fiduciary duty claims will be measured by the assertions that National's sole motivation in seeking a sale of the Weirton Division assets was the avoidance of future or prospective pension benefits obligations and that National Steel has not acted solely in the interests of pension plan beneficiaries and participants.

Specific rules relating to defined prohibited transactions are contained in 29 U.S.C. § 1106. A fiduciary is not permitted to have the plan engage in certain direct or indirect transactions with a party in interest. A plan fiduciary is prohibited from dealing with plan assets in his own interests, on behalf of persons whose interests are adverse to the interests of the plan, or from receiving any personal consideration as a result of plan transactions. *Id.* In addition to these specific prohibitions, general fiduciary standards are set forth in 29 U.S.C. § 1104. Plan fiduciaries must discharge duties with respect to an employee benefit plan solely in the interests of plan participants and beneficiaries. 29 U.S.C. § 1104. The fiduciary must act for the exclusive purpose of providing benefits to beneficaaries and must conduct the affairs of the plan with the care, skill, prudence, and diligence under the circumstances that a prudent man would use. Further the fiduciary must diversify the plan investments so as to minimize the risk of large losses, and must act in accordance with the documents and instruments governing the plan insofar as they are consistent with law. *Id.*

According to the terms of the pension plan, it is clear that National Steel is a fiduciary and must carry out duties with regard to plan management in accordance with the fiduciary standards set forth above. An examination of the plan document reveals that certain designated National employees administer the plan with respect to payment of benefits, etc., but that the plan is financed through contributions to a trust fund managed and held by a separate entity.

It is the opinion of the Court that the duties with regard to prohibited transactions apply directly to activities affecting the fiscal assets of the plan funds. In other words, for the provisions of 29 U.S.C. § 1106 to apply, there must be a transaction involving the monies, property, or other assets of the fund. *See Donovan* v. *Bierwirth*, 680 F.2d 263, 270 (2nd Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 488 (1983). This notion flows from the very language of the statute ("A fiduciary . . . shall not cause the plan to engage in a transaction . . ., etc.) and is supported by the legislative history. *See* H.R.

Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess., ____, *reprinted in* 1974 U.S. Code, Cong. & Ad. News, 5038, 5087-5089.

The segregation of National Steel pension fund assets relating to Weirton Division employees for transfer to a separate trust account, as contemplated in the terms of sale, is not the type of transaction, in the Court's judgment, which would invoke 29 U.S.C. § 1106. The Court earlier concluded that the assets of a pension fund were not being sold in any manner and neither the assets nor the liabilities of the National Steel pension fund were being transferred to the new company. The Court now finds that the terms of sale under consideration do not require a pension fund to conduct any transaction, prohibited or not prohibited, such as would implicate 29 U.S.C. § 1106.

It would appear that Congressional intent with regard to the more general fiduciary duties of 29 U.S.C. § 1104 also focusses on activities affecting the fiscal assets of the plan. *See* H.R. Rep. No. 93-533, 93rd Cong., 2d Sesss., ____, *reprinted in* 1974 U.S. Code Cong. & Ad. News, 4639, 4659; S. Rep. No. 93-127, 93rd Cong., 2d Sess., ____, ____, *reprinted in* 1974 U.S. Code Cong. & Ad. News, 4838, 4847 and 4864-4865. However, some federal courts have expanded the expression of fiduciary duty beyond transactions involving pension fund assets. Without making a decision which would have precedential value in this jurisdiction, and limited to the facts presently before the Court for decision, it is the opinion of the Court that this hearing on motion for summary judgment requires acceptance of a liberal view of fiduciary duties under § 1104, thus giving Plaintiffs' opposition to the motion the broadest possible consideration. The dichotomy between Congressional intent and judicial treatment aside, it is firmly established that the standard for review of fiduciary action when a § 1104 violation is alleged is whether the action is arbitrary and capricious. *See, e.g., Fentron Industries* v. *Nat. Shopmen Pension Fund*, 674 F.2d 1300, 1307 (9th Cir. 1982). Therefore, a violation of § 1104 fiduciary standards must be based on a showing of bad faith or some other indicia of arbitrary and capricious action. *Id.* and

Schulist v. *Blue Cross of Iowa*, 553 F. Supp. 248 (N.D. Ill, 1982).

The Court's earlier finding that the proposed amendments to the pension plan, inherent in the terms of sale, do not violate ERISA's vesting and non-forfeitability provisions precludes any contention that a fiduciary duty was breached on the basis that some pension "obligation" will be limited or forfeited if the terms of sale are approved. *Petrella* v. *NL Industries*, *supra*, 529 F. Supp. at 1366-1367. *Cf. Brug* v. *Pension of Carpenters*, *etc.*, 669 F.2d 570, 574-576 (9th Cir.), *cert. denied*, ___ U.S. ___, 74 L.Ed.2d 116 (1982) (amending pension eligibility retroactively violates fiduciary duty on facts presented).

Plaintiffs' contentions that fiduciary duties are violated because National was motivated to avoid prospective pension benefits, and that National has not acted solely in the interests of pension plan beneficiaries and participants, suffer two fatal defects. First, embracing Plaintiffs' theory *in toto* would preclude *any* company offering pension benefits from amending the plan in such a way as to limit or eliminate provisions for benefits that are not vested or accrued. As stated before, such is not the state of the law.

Second, Plaintiffs' theory requires a view that *every* corporate decision arguably affecting pension benefits must be made solely in the interests of pension plan beneficiaries and participants. In the context of a decision which limits or eliminates prospective, conditional pension benefits, not required by the vesting and non-forfeitability provisions of ERISA, such is not the case.

The pension plan specifies that National Steel is responsible for the administration of the pension program. A "dual loyalty" inherently exists when the employer (which is naturally interested in keeping its costs for pension benefits at a minimum) also acts as administrator or fiduciary of a pension plan. However, ERISA contemplates and approves of such an arrangement in certain circumstances by providing that one may serve as a fiduciary in addition to being an officer, agent or other

representative of an employer. 29 U.S.C. § 1108(c)(3). *See Donovan* v. *Bierwirth*, 538 F. Supp. 463, 468 (E.D. N.Y. 1981), *aff'd as modified (on other grounds)*, 680 F.2d 263 (2nd Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 488 (1983). *Flinchbaugh* v. *Chicago Pneumatic Tool, Co.*, 531 F. Supp. 110 (W.D. Pa. 1982). When acting on behalf of the pension fund, there is no doubt that a fiduciary having such "dual loyalty" must act solely to benefit participants and beneficiaries. However, it is the Court's opinion here that when a corporate employer negotiates the terms of sale of a division, whose employees are participants in a pension plan, the negotiations that affect the terms and conditions of future pension benefits (at least those that are not protected by ERISA's vesting and non-forfeitability provisions), do not implicate fiduciary duties as to the pension fund. Such negotiations are distinct from actually administering a plan and conducting transactions affecting the monies and property of the plan's fund. In other words, the mere fact that a company has named itself as pension plan administrator, fiduciary, or trustee does not restrict it from persuing reasonable business behavior in negotiations concerning pension benefits not otherwise affected by the requirements of ERISA. *See N.L.R.B.* v. *Amax Coal Co.*, 453 U.S. 322, 333 n. 16 (1981).[2]

Even if a fiduciary duty were to be imposed on a corporate employer in a situation such as is now presented, the Court would be bound to conclude that no duty was violated here. The Court earlier concluded that the proposed amendments do not

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[2] As earlier mentioned, the corporate pension plan specifies that the pension program is administered by a committee of designated National employees and that most of the assets of the plan are held by a trust fund, managed and held by a separate entity. It has occurred to the Court that since the people actually administering the pension fund may not be at all involved in the negotiations for the sale of the Weirton Division, no breach of fiduciary duty under 29 U.S.C. § 1104 would arise because of a division of labor within the corporation. However, the issues before the Court were framed to test National's participation in the events surrounding the proposed sale as a corporate entity.

deprive any Plaintiff of a vested or non-forfeitable benefit. The Court also concluded the amendments proposed are reasonable under the circumstances. Finally, the Court would conclude that since all employees of the Weirton Division (not just the salaried, non-union plaintiffs) would be equally affected by the proposed changes, there is no discrimination. On the facts presented here, the action of National Steel in negotiating the terms of sale that affect ancillary pension benefits was neither arbitrary or capricious. There has not been a showing of bad faith.

In conclusion, the Court finds that the terms of sale proposed to amend the pension program for salaried, non-union personnel at Weirton do not violate provisions of ERISA relating to prohibited transactions; do not violate provisions of ERISA relating to fiduciary duties upon National Steel; do not violate provisions of ERISA relating to vested, accrued benefits, or non-forfeitability, and do not conflict with provisions of the existing pension plan.

SEVERANCE PAY ISSUES

According to National Steel's policy on termintion of exempt, salaried Weirton Division employees (See affidavit of John A. McCreary, given on June 21, 1983, with attached Exhibit), severance pay is made available to those who are discharged from employment only if the circumstances surrounding the termination meet certain criteria. Those who are separated from employment with National Steel because of resignation; dismissal due to misconduct or failure to maintain appropriate work performance standards; or because of quitting without notice or absence from work for five days without notice are not entitled to any severance pay allowance. The heir or other beneficiary of a salaried, non-union employee who dies is entitled to receive salary to the end of the current month and all vacation pay due. However, those who are separated from employment because a salaried exempt position has been terminated or due to reductions in the salaried exempt work force are said to be terminated under honorable circumstances

and entitled to severance pay that varies with the length of service of the individual.

The policy on severance pay has been in force since September, 1979. Revisions were made in 1980, 1981, and 1982, but did not substantively change eligibility for severance pay benefits. In accordance with the terms of sale, National again amended its termination policy for exempt salaried personnel at Weirton on April 4, 1983, to provide that the sale of the Weirton Division assets will not entitle such persons to severance benefits.

In general, a severance allowance is payment by an employer to an employee on termination of the employee's employment. Black's Law Dictionary, 1232 (5th ed. 1979). Such payment is beyond wages and is usually designed to ease the employee's financial burdens while looking for new employment. *See Owens* v. *Press Publishing Co.*, 20 N.J. 537, 120 A.2d 442 (1956).

Though not a retirement benefit, severance pay does come within the reach of ERISA as an "employee welfare benefit plan." 29 U.S.C. §§ 1002(1) (citing 29 U.S.C. § 186 and the benefits described therein), 1002(2)(B). The "vesting" or "accrued benefit" provisions of ERISA (which mainly apply to pension plans) do not apply to severance pay benefits plans in general, *Calhoun* v. *Falstaff Brewing Co.*, 478 F. Supp. 357, 360 (E.D. Mo. 1979), and do not apply to the severance pay provisions of the policy in issue here in particular.

Federal courts frequently look to the language of severance pay policies as a guide in determining whether violations have occured. *See, e.g., Donnelly* v. *Aetna Life Ins. Co.*, 465 F. Supp. 696 (E.D. Pa. 1979). The version of the termination policy, in effect immediately before any amendment was made to reflect the terms of sale, was promulgated December 31, 1982. The pre-amendment purpose of the policy was said to be:

> 2.1 It is the intent of the Weirton Steel Division to provide continuous employment to all exempt salaried employees. However, conditions may arise which necessitate the dismissal of an individual or a perma-

> nent decrease in the work force. It is the purpose of this policy to provide an equitable measure of compensation for eligible individuals whose employment has been terminated by the Company under honorable circumstances and to encourage management personnel to take prompt action whenever an individual lacks the ability to perform the duties of the position satisfactorily.

The purpose has not been substantively modified since the termination policy was initially announced in 1979. From an examination of the overall purpose of the policy and the definition of termination under honorable circumstances (the only type of discharge giving rise to severance pay benefits), the Court concludes that severance pay at National's Weirton Division is compensation granted in lieu of continuous employment to aid those terminated without fault of the employee.

In large measure, the reasoning of the Court with regard to prohibited transactions and other fiduciary duties of National Steel under ERISA for pension benefit issues apply equally to severance pay issues. Because no activity affecting the fiscal assets of a welfare benefit plan is implicated with the proposed amendments to severance allowance provisions in the agreement, 29 U.S.C. § 1106 (prohibited transactions) cannot apply. Indeed, the funding requirements of ERISA do not apply to employee welfare benefits plans such as severance pay benefit, 29 U.S.C. § 1081, and there is no "fund" or group of assets subject to the prohibited transaction provisions. Because severance pay benefits are not subject to ERISA's vesting and non-forfeitability requirements, there can be no breach of fiduciary duty on the part of any party for proposing a limit to such benefits on the basis that some "vested" right is curtailed. The distinction between a corporate fiduciary duty when administering a benefit plan and corporate activities in connection with negotiating changes in a benefit plan which were enunciated with regard to pension issues is applicable to this discussion of severance pay benefits. Therefore, there has been no violation of an ERISA-based fiduciary duty with regard to the proposed severance pay amendment.

The Court is also satisfied that the amendment to the personnel policy controlling termination of non-union, salaried employees to preclude severance benefits solely on the basis of the transfer of ownership of the Weirton Division is reasonable and does not violate the preamendment terms of the policy. Simply put, the fundamental bases for this benefit are not necessarily put into play by such a transfer of ownership; namely, the permanent abolishment of positions or reductions in the salaried work force.

The Court earlier found that all, or a substantial majority of all, the active employees of National's Weirton Division will be offered an opportunity to work for the proposed employee-owned company. No discontinuity of employment is expected for anyone (except those who choose to quit or retire). It can be said with certainty that any salaries, non-union employee of National Steel who becomes employed by the new employer following the transition of ownership is not entitled to a severance allowance under the termination policy or under ERISA. *Pinto* v. *Zenith Radio Corp.*, 480 F. Supp. 361 (N.D. Ill. 1979), *aff'd*, 618 F.2d 110 (7th Cir. 1980) (table). Also, the agreement in principle containing the terms of sale from National Steel states that National will remain liable for outstanding and unrevealed severance pay claims. To say that any individual employee of National at Weirton will have a valid severance pay claim that will be denied is purely speculative and it cannot be said that any existing Plaintiff would be a proper party to such a claim. (This motion for summary judgment only tests the proposed terms of sale and their effect on salaried, non-union personnel as a group.)

In conclusion, the Court finds that the terms of sale relating to severance pay and the correlated amendment to National Steel's policy on termination of exempt, salaried Weirton Division employees do not violate provisions of ERISA relating to prohibited transactions; do not violate provisions of ERISA relating to fiduciary duties; do not violate provisions of ERISA relating to vested, accrued benefits or non-forfeitable benefits,

and do not violate provisions of the existing policy on severance pay for salaried, non-union personnel.

THE MOTION TO DELAY CONSIDERATION

Counsel for Plaintiffs in this case have filed a motion to delay consideration of National's motion for partial summary judgment until further discovery is completed. The motion and accompanying discovery documents filed would indicate Plaintiffs desire to explore the motivations of National Steel to bolster the alleged ERISA-based prohibited transaction and fiduciary duty claims of the complaint.

As earlier mentioned, in furtherance of its desire for expedited decision on the issues presented in the motion for summary judgment, Defendant National has conceded all of the claims of Plaintiff with regard to motivation and intent (for the purposes of this motion only).

Because the Court's ruling on National's motion for summary judgment is limited to issues surrounding the agreement in principle on terms of sale between National and a proposed, employee-owned company; and because the Court has considered Plaintiff's characterization of National's motivation for sale between National and a proposed, employee-owned company; and because the Court has considered Plaintiff's characterization of National's motivation for sale of the Weirton Division as true, there is no need to delay a ruling on the issues as framed. Accordingly, it is the opinion of the Court that Plaintiffs' motion for delay must be denied in large measure.

Since there are other issues raised by the complaint, not reached in today's ruling, further discovery may be necessary as to the undecided questions of this litigation. Provided the discovery is accomplished within the framework established by the Federal Rules of Civil Procedure and the Local Rules of this Court, Plaintiff's motion will be granted only in part as suggested.

THE UNION MOTIONS TO DISMISS

Defendant Independent Steelworkers Union has moved to dismiss Plaintiffs' first cause of action for failure to state a claim upon which relief can be granted. Plaintiffs have not opposed the motion. A claim should not be dismissed under Rule 12(b)(6), Federal Rules of Civil Procedure, unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *McLain* v. *Real Estate Board*, 444 U.S. 232, 246 (1980). *Conley* v. *Gibson*, 355 U.S. 41, 45-56 (1957).

The Union is not specifically named in the first cause of action of the complaint. A fair reading of this portion of the complaint reveals Plaintiff attempts to state a cause of action under ERISA. Allegations are stated concerning the Plaintiffs' eligibility for employee welfare benefit plans, and concerning the administration of such plans. Those persons responsible for the administration and management of pension and welfare benefit funds are generally proper defendants in suits charging ERISA violations. *Boyer* v. *J. A. Majors Emp. Profit Sharing Plan*, 481 F. Supp. 454 (N.D. Ga. 1979). It is not alleged, however, that Defendant Union has any formal connection with the employee welfare benefit plans for salaried, non-union personnel at the Weirton Division, nor has there been any evidence that would infer such a connection. Indeed, any nexus between these Plaintiffs and the Independent Steelworkers Union would appear to be remote, at best.

Because Plaintiffs have not specifically named Defendant Union in the first cause of action; because the Union may not be a proper party to an ERISA-based claim by these Plaintiffs; because the connection between the Union and these Plaintiffs is remote, and because there has been no response or opposition to the motion, it is the opinion of the Court that the Union's motion to dismiss the first cause of action for failure to state a claim must be granted.

As to the second cause of action in the complaint, Defendant Union urges that the Court lacks subject matter jurisdiction

over the numerous claims therein. Whenever it appears that a federal court lacks subject matter jurisdiction, the acion or claims must be dismissed. *Trent Rlty. Assoc.* v. *First Fed. Sav. & Loan Assoc.*, 658 F.2d 29, 36 (3rd Cir. 1981).

The second cause of action in the complaint alleges that "(j)urisdiction of this Court . . . is retained and invoked pursuant to the pendent jurisdiction of this Court." Among the thirty paragraphs in the second cause of action are references to the West Virginia Labor-Management Relations Act, W. Va. Code §§ 21-1A-1, et seq., the public policy of the State of West Virginia, and a claim of mental anguish and emotional and physical distress. Although several federal statutes are also cited in the second cause of action, the Court presumes the above-listed three areas are the aspects of the cause of action to which Plaintiffs refer when they seek to invoke the Court's pendent jurisdiction.

In general terms, the doctrine of pendent jurisdiction allows a federal district court, cloaked with subject matter jurisdicton over one or more of a plaintiff's claims, to take jurisdiction of another of plaintiff's claims although there is no independent basis of federal jurisdiction. since complete diversity does not exist between Plaintiffs and either defendant in the instant action, the Court must presume Plaintiffs' theory is that federal question jurisdiction exists as to some claim against Defendant Union and that the three areas of State law earlier set forth forms the basis of additional claims against the Union. However, the Court has dismissed the ERISA-based first cause of action (as to the Union) for failure to state a claim. In the present posture of this litigation, it would appear that Plaintiffs seek to assert State law claims against this Defendant without asserting a viable federal law claim. Even assuming the ERISA-based claims are viable as to the co-defendant, National, such an extension of subject matter jurisdiction should be undertaken with extreme caution. *Aldinger* v. *Howard*, 427 U.S. 1 (1976).

In any case, the doctrine of pendent jurisdiction is a matter of discretion, not of plaintiff's right. *United Mine Workers of*

America v. *Gibbs*, 383 U.S. 715, 726 (1966). With due consideration to judicial economy, convenience, and fairness to the litigants, the Court is of the opinion that pendent jurisdiction should not be invoked against Defendant Union in this civil action. Without the pendent claims of the second cause of action, Defendant Union would not be a party to this litigation since it is not specifically named in the only other cause of action in the complaint. In consideration of today's ruling on Defendant National Steel's partial summary judgment motion, it must be said that as to any Defendant, the pendent, State-law claims predominate the remaining issues in this litigation. If there was a substantial federal question foundation on which to pend State-law claims, it has been considerably diminished by partial summary judgment in favor of National. The Court does not believe it would be fair to require the Union to defend the claims of the second cause of action given the remote connection, if any, between these Plaintiffs (non-union employees) and the Independent Steelworkers Union.

The second cause of action of the complaint is drafted in a broad and ranging manner, making delineation and interpretation of the claims presented somewhat difficult for the Court and the answering parties. Since the second cause of action is quite similar in nature to that of the complaint and amended complaint in the *Sutton* litigation, it is felt it would be fair to note that deficiencies of pleading have been pointed out both in open court (by the Court and counsel) and in documents of record in the case file. Counsel for Plaintiffs has not seen fit to rectify the deficiencies in an effective manner. *Cf.* Plaintiff's Submission of Issues, filed May 20, 1983. It must also be noted that counsel for Plaintiffs has not indicated opposition or other response to the motion under consideration.

Even though the first paragraph of the second cause of action of the complaint would tend to infer that only matters of pendent jurisdiction will be alleged in the following paragraphs, there are some claims which might be interpreted as stating claims under federal law. For example, Plaintiffs allege that the Union (with co-defendant National Steel) has

"breached in bad faith" the express provisions of ERISA. Complaint § 81. Because the Plaintiffs are not members of Defendant Union (or any union) and because it appears there is no formal connection between Defendant Union and the pension plan in issue, it would appear that fairness to the parties requires that the inference of federal claims in the second cause of action be ignored. Perhaps the failure of Plaintiffs to respond to the Union's motion requires such treatment. *McNutt* v. *General Motors Corp.*, 298 U.S. 178, 189 (1936). *Grafon Corp.* v. *Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979).

In conclusion, the Court finds that Defendant Union is not a proper party to the second cause of action as stated in the complaint.

ORDER

The foregoing constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure. Upon the reasoning and conclusions herein, it is

ORDERED that the motion of Defendant National Steel Corporation for partial summary judgment on the issues earlier delineated is GRANTED. It is

ORDERED that the motion of Plaintiffs' to delay consideration of National's motion for summary judgment is DENIED in part, and GRANTED in part, as earlier delineated. It is further

ORDERED that the motion to dismiss of Defendant Union pursuant to Rule 12(b), Federal Rules of Civil Procedure, is GRANTED; that Defendant Independent Steelworkers Union be dismissed as a party, and that the style of this civil action be changed to reflect the dismissal.

There are other issues raised and suggested by the complaint which are not resolved to date. The Court will look to

counsel for the various parties to begin proceedings which will mature these matters for speedy disposition.

ENTER: September 8th, 1983.

/s/ _____
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. Attest: Thomas F. Stafford, Clerk, U.S. District Court, Northern District of West Virginia

By: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 80-0035-W

EUGENE R. SUTTON, *et al*,

Plaintiffs,

v.

WEIRTON STEEL DIVISION OF NATIONAL STEEL CORPORATION, *et al*

Defendants.

U.S. DISTRICT COURT
FILED AT WHEELING, W. VA.

SEP. 15 1983

THOMAS F. STAFFORD
Clerk

Received 9/13/83

CIVIL ACTION NO. 80-0040-W

GERALD W. BRUNNER, *et al*,

Plaintiffs,

v.

NATIONAL STEEL CORPORATION, *et al*,

Defendants.

ORDER

This day the Court has entered Orders directing entry of final judgment in each of the two above styled civil actions as to certain claims decided by memorandum decision entered July 8, 1983 and pursuant to Rule 54(b), Federal Rules of Civil

Procedure, has found there is no just cause existing for delay in the entry of a final judgment under Rule 58, Federal Rules of Civil Procedure.

In consideration of the action this day taken by the entry of such order and final judgment, it is

ORDERED that Plaintiff's Motion for Interlocutory Appeal, pursuant to 28 U.S.C. 1292(b) be, and the same is hereby DENIED and Plaintiffs' Motion for Reconsideration of the Court's decision herein on the claims resolved by the Court's memorandum decision of July 8, 1983 is likewise ORDERED DENIED.

ENTER: September 14th 1983.

/s/ _____
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. Attest: Thomas F. Stafford, Clerk, U.S. District Court, Northern District of West Virginia

By: _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 80-0035-W

EUGENE R. SUTTON, *et al*,
Plaintiffs,

v.

WEIRTON STEEL DIVISION OF NATIONAL STEEL CORPORATION; *et al*.
Defendants.

Received 9/15/83

ORDER DIRECTING ENTRY OF FINAL JUDGMENT AS TO CERTAIN CLAIMS AND DETERMINATION THAT NO JUST CAUSE EXIST FOR DELAY PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendants National Steel Corporation, National Steel Retirement Program and the Independent Steelworkers Union have filed a joint motion requesting entry of final judgment as to certain claims adjudicated in the prior Memorandum Opinion and Order of this Court entered July 8, 1983 and filed July 11, 1983, and, as to defendant Independent Steelworkers Union alone, in the Order of the Court entered June 2, 1983 and filed June 3, 1983, and a determination that there is no just cause for delay in entering final judgment with respect to the claims adjudicated pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Upon consideration of the Joint Motion of Defendants, it is expressly determined that there is no just cause to delay the entry of final judgment as to the certain claims adjudicated in such Memorandum Opinion and Orders and it is

ORDERED that final judgement be entered in the form of judgment attached to this Order.

Entered: September 14th, 1983.

/s/ _____
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. Attest: Thomas F. Stafford, Clerk, U.S. District Court, Northern District of West Virginia

By: _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 80-0035-W

EUGENE R. SUTTON, *et al*,

Plaintiffs,

v.

WEIRTON STEEL DIVISION OF NATIONAL STEEL CORPORATION; *et al.*

Defendants.

FINAL JUDGMENT AS TO CERTAIN CLAIMS

ORDERED, ADJUDGED AND DECREED, that:

1. The terms of sale proposed to amend 70/80 and Rule-of-65 retirement provisions of the pension agreement between National Steel Corporation and the Independent Steelworkers Union to the effect that the sale of assets of the Weirton Steel Division of National Steel Corporation to the Weirton Steel Corporation does not constitute an event giving rise to entitlement to, or eligibility for 70/80 or Rule-of-65 retirement benefits, or constitute the lack of suitable long term employment, does not violate:

(a) Provisions of ERISA (29 U.S.C. § 1106) relating to prohibited transactions;

(b) Provisions of ERISA (29 U.S.C. § 1104) relating to fiduciary duties imposed upon National Steel Corporation or the National Steel Corporation Retirement Program;

(c) Provisions of ERISA (29 U.S.C. §§ 1102 et. seq., 1056(a) and 1053) relating to vested accrued benefits or nonforfeitable benefits;

(d) Provisions of the pension agreement or collective bargaining agreement an enforceable pursuant to 29 U.S.C. § 185, or

(e) Provisions of the federal labor laws (29 U.S.C. § 185, as developed federal common law) by reason of National Steel Corporation and the Independent Steelworkers Union acting in concert to implement the amendments to the pension agreement, including, as to defendant Independent Steelworkers Union, the duty of fair representation in agreeing to propose such amendments to its membership for vote.

2. The terms of sale proposed to amend the severance allowance provisions of the collective bargaining agreement between National Steel Corporation and the Independent Steelworkers Union to the effect that the sale of assets of the Weirton Steel Division of National Steel Corporation to the Weirton Steel Corporation does not constitute an event giving ise to entitlement to, or eligibility for severance allowance does not violate:

(a) Provisions of ERISA (29 U.S.C. § 1106) relating to prohibited transactions;

(b) Provisions of ERISA (29 U.S.C. § 1104) relating to fiduciary duties imposed upon National Steel Corporation;

(c) Provisions of ERISA (29 U.S.C §§ 1102 et. seq., 1056(a) and 1053) relating to vested accrued benefits or nonforfeitable benefits;

(d) Provisions of the collective bargaining agreement as enforceable pursuant to 29 U.S.C. § 185, or

(e) Provisions of the federal labor laws (29 U.S.C. § 185 as developed as federal common law) by reason of National Steel Corporation and the Independent Steelworkers Union acting in concern to implement the amendment to the collective bargaining agreement, including, as to defendant Independent Steelworkers Union, the duty of fair representation in agreeing to propose such amendments to its membership for vote.

3. As to defendant Independent Steelworkers Union:

(a) The Court lacks subject matter jurisdiction as to pendant state claims under the West Virginia Labor Management

Relations Act and under the "fundamental and substantial policies of the Government of . . . the State of West Virginia;"

(b) The Complaint, as amended, fails to state a claim upon which relief can be granted as to the pendant state claim for recovery for mental anguish;

(c) The Complaint, as amended, fails to state a claim upon which relief can be granted as to claim for breach of the duty of fair representation brought pursuant to 29 U.S.C § 185.

APPROVED.

Entered: September 14th, 1983.

/s/ _____
United States District Judge

ENTER: September 15, 1983.

/s/ _____
Clerk of Court

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. Attest: Thomas F. Stafford, Clerk, U.S. District Court, Northern District of West Virginia

By: _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 80-0035-W

EUGENE R. SUTTON, *et als*,

Plaintiffs,

v.

WEIRTON STEEL DIVISION OF NATIONAL STEEL CORPORATION; *et als*,

Defendants.

ORDER

Defendant Independent Steelworkers Union has filed a multi-part motion to dismiss. There has been no response from Plaintiffs. The Court would note that the motion to dismiss was filed prior to Plaintiffs' motion to amend and file a first amended complaint. From matters presented at hearings conducted on motion for preliminary injunctive relief in this action on April 27 and 28, 1983, at the Wheeling point of holding Court, it is clear that the amended complaint differs from the original complaint only in that it adds the Pension Agreement Between the National Steel Corporation and Independent Steelworkers Union as Defendants. It is also clear that the Union's motion to dismiss is directed to Plaintiffs' complaint as amended.

Three of the grounds for relief in the motion to dismiss urge that the amended complaint fails to state a cause of action upon which relief can be granted. A complaint should not be dismissed upon this ground unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *McClain* v. *Real Estate Board*, 444 U.S. 232, 246 (1980), *Conley* v. *Gibson*, 355 U.S. 41 (1957). In ruling on a motion to dismiss, the Court must consider Plaintiffs' allegations as true, *Jenkins* v. *McKeithen*, 395

U.S. 411, 421-422 (1969), and must liberally construe plaintiffs allegations. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974). For its fourth ground for relief, Defendant Union urges that the Court lacks subject matter jurisdiction over certain of the claims. The tests for motions to dismiss under Rule 12(b)(1) and under 12(b)(6), Federal Rules of Civil Procedure, are much the same. The Court would note, however, that whenever it appears that a federal court lacks jurisdiction of the subject matter, the action or claims must be dismissed. *Trent Rlty. Assoc.* v. *First Fed. Sav. & Loan Assoc.*, 657 F.2d 29, 36 (3rd Cir. 1981), Rule 12(h)(3), Federal Rules of Civil Procedure. With these principles in mind, the Court turns to the merits of the motion.

As was noted on the record at hearings held in this action on April 13 and 27-29, 1983, the complaint and amended complaint are drafted in a broad and ranging manner, making delineation and interpretation of the claims presented somewhat difficult for the answering parties. The second cause of action in the amended complaint states that "(j)urisdiction of this Court with regard to this Second Cause of Action is retained and invoked pursuant to the pendent jurisdiction of this Court." Among the 31 paragraphs in the second cause of action are references to the West Virginia Labor-Management Relations Act, W. Va. Code §§ 21-1A-1, et seq., the public policy of the State of West Virginia, and a claim of mental anguish and emotional and physical distress. Although several federal statutes are also cited in the second cause of action, the Court presumes that the above-listed three areas are the aspects of the cause of action to which Plaintiffs refer when they seek to invoke the court's pendent jurisdiction.

Aside from the sources of jurisdictional law, the second cause of action claims Defendant Union, acting through unlawfully elected officers, has engaged in a clandestine and surreptitious conspiracy to deprive Plaintiffs of rights and benefits under their pension plan; has directed a false and fabricated negotiation process which is not at arms length; has violated its fiduciary and confidential obligations to Plaintiffs;

have discriminated against Plaintiffs; have acted in bad faith, and have breached an implied covenant of fair dealing. (Aside from allegations that possibly could be undergirded by pendent jurisdiction, Plaintiffs also claim the Union breached its duty of fair representation under the Labor-Management Act of 1947 (sic), 29 U.S.C. §§ 141, et seq.; violated the express provisions of the Employee Retirement Income Security Act (E.R-.I.S.A.), 29 U.S.C. §§ 1001, et seq., and violated the terms of a collective bargaining agreement. It is the opinion of the Court that these claims raise exclusively federal questions. *See, e.g., Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957).)

By its own terms, the West Virginia Labor Management Relations Act does not apply to employers, employees, and labor organizations subject to the provisions of National Labor Relations Act. W. Va. Code § 21-1A-2(a). *See United Maintenance & Mfg. Co.* v. *United Steel Workers*, 157 W. Va. 788, 204 S.E.2d 76 (1974). Plaintiffs amended complaint would indicate that the parties to this controversy are subject to the provisions of the National Labor Relations Act, (Complaint at § 178). Thus, the West Virginia Labor Management Relations Act would apparently have no application to this litigation.

At paragraph 215, the amended complaint states Defendant Union's "act and conduct are in violation of the fundamental and substantial policies of the Government of . . . the State of West Virginia." When questioned about the basis for pendent jurisdiction at the hearing of April 27-29, 1983, counsel for Plaintiffs referred to policy reflected in the State's Labor Management Relations Act as well as to "judicially created substantive law." Counsel did not refer the Court to specific decisions, nor has such been done subsequently. In referring to the claims of the complaint's second cause of action above, Defendant Union's memorandum in support of the instant motion urges "(t)hese allegations of misconduct represent the precise types of conduct which the federal labor laws were intended to prohibit." Without further specifics from Plaintiffs, the Court is inclined to agree. (The Court would repeat that the complaint is not entirely clear, and this has made response by the

parties more difficult.) At this juncture, the Court would note that some of the claims presented might well state a cause of action under federal labor statutes and policy. Some assertions under federal labor statutes and policy violations preempt claims under State law and policy. *See, e.g., San Diego Unions* v. *Garmon*. 359 U.S. 236, 243-246 (1959). In addition, the second cause of action is replete with allegations of violations of E.R.I.S.A. The pertinent provisions of E.R.I.S.A. "supercede any and all State laws insofar as they . . . relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). It is the opinion of the Court that claims asserted under the policies of the State of West Virginia must now be dismissed on the record as presently constituted.

For all the foregoing reasons, it is

ORDERED that Defendant Union's motion to dismiss pendent claims for lack of subject matter jurisdiction is GRANTED insofar as Plaintiffs seek to state claims under the West Virginia Labor Management Relations Act and under the "fundamental and substantial policies of the Government of . . . the State of West Virginia."

Paragraph 220 of the complaint, part of the second cause of action, states: "The aforementioned acts and conduct of (Defendants) are causing and continue to cause Plaintiffs mental anguish and emotional and physical distress, . . ." Defendant Union has moved to dismiss these claims for failure to state a claim upon which relief can be granted. Under West Virginia law, the right to recovery for emotional distress, absent some physical injury or a subsequently developed physical injury, is ordinarily predicated on some *intentional* wrong by defendant. *Harless* v. *First Nat'l Bank in Fairmont*, 289 S.E.2d 692 (W.Va. 1982). While "physical distress" is pleaded, there is no mention of physical or bodily injury, the usual language in pleading the tort of mental anguish or emotional distress in West Virginia. Without an allegation of physical or bodily injury, recovery for mental anguish or emotional distress must be based on a pleading of intentinoal or reckless conduct.

Sprouse v. *Clay Communications*, 211 S.E.2d 674 (W. Va. 1975) (subsequent history omitted).

Paragraph 214 of the complaint does charge reckless and willful conduct, although these allegations are not directly connected to the claims of mental anguish and emotional distress. Notwithstanding the broad, basic principles governing motions to dismiss for failure to state a cause of action, discussed above, the Court believes that dismissal of the subject claims at this juncture is proper. Therefore, it is

ORDERED that Defendant Union's motion to dismiss claims for mental anguish is granted.

Defendant Union has also moved to dismiss on the basis Plaintiffs' complaint fails to state a claim of breach of the duty of fair representation under 29 U.S.C. § 185. Defendant states Plaintiffs have failed to exhaust intra-union remedies available and avers that it has fulfilled its obligations of fair representation. Defendant's memorandum further urges the amended complaint fails to plead any supporting facts, and only states conclusory allegations. *See Lusk* v. *Eastern Products Corporation*, 427 F.2d 705 (4th Cir. 1970).

The United States Court of Appeals for the Fourth Circuit has held that allegations of a complaint alleging a breach of a union's duty of fair representation fails to state a valid claim unless specific supporting facts are alleged. *Lusk*, *supra*, at 708. The Fourth Circuit is not alone in this requirement. *See* Annot., 52 A.L.R.Fed. 591, 598-599 (1981). And, such requirement has been imposed in areas beyond labor law. *See, e.g.*, *Harper* v. *United States*, 423 F. Supp. 192, 196 (D.S.C. 1976). Even under the liberal notions of notice pleading, it is the opinion of the Court that it would be difficult and unfair to require Defendant Union to answer this particular aspect of the complaint herein, given the state of the record before the Court. As to this aspect of the two causes of action, the complaint is devoid of names, dates, and places and such other factual bases that would reveal Plaintiffs' contentions. Therefore, it is

ORDERED that the Defendant Union's motion to dismiss for failure to state a claim under 29 U.S.C. § 185 is GRANTED.

The named Plaintiffs, who are alleged to be participants in the pension plan in question, must be viewed as proper parties (at this juncture) to present claims of E.R.I.S.A. violations. *Utility Workers Union* v. *Consumers Power Co.*, 453 F. Supp. 447, 450 (E.D. Mich. 1978). Those persons responsible for the administration and management of pension and welfare benefit funds are generally proper defendants in suits charging E.R-.I.S.A. violations. *See Boyer* v. *J. A. Majors Elmp. Profit Sharing Plan*, 481 F. Supp. 454 (N.D. Ga. 1979). It is the opinion of the Court that either Defendant National Steel or Defendant Pension Agreement are proper defending parties for the claims of breach of fiduciary duties and prohibited transactions under E.R.I.S.A. Of course, the instant motion goes to the propriety of the Union as a Defendant. A limited view of the controversy here could allow dismissal of the Union since it may not be directly responsible for the administration plan.

A review of the complaint, however, reveals allegations that the Defendant Union is intimately involved in the mechanisms and activities which may have set in motion changes alleged to be violations E.R.I.S.A. The Court is concerned that dismissal of the Union as to the E.R.I.S.A. claims at this juncture might possibly subvert some theory which might render this entity liable, although such is not now readily apparent. In general, federal courts are encouraged to entertain the broadest scope of action consistent with fairness to the parties; and joinder of parties and cliams is part of that consideration. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 724 (1966). See Rule 20, Federal Rules of Civil Procedure.

Defendant Union also urges that claims under E.R.I.S.A. are premature for court intervention because Plaintiffs have failed to submit to arbitration procedures for grievances established in the Pension Plan and the pertinent collective bargain-

ing agreement. *See* Annot., 54 A.L.R.Fed. 364 (1981). Regulations promulgated under E.R.I.S.A. permit a claims or grievance procedure which incorporate the mechanisms set forth in a collective bargaining agreement. 29 C.F.R. § 2650.503-1(b)(2). However, the general requirement of exhaustion of non-judicial remedies for E.R.I.S.A. claims is subject to exceptions. *See* Annot., 54 A.L.R.Fed, *supra*, at 369-370. As this Court has come to understand the E.R.I.S.A. based claims of this litigation, through the pleadings and through testimony adduced at hearings, it apears that forcing Plaintiffs to exhaust grievance procedures established in the documents referred to above would be futile in light of the current state of transition of ownership of the Weirton Division facilities and the close time constraints which bear on all parties.

For all the foregoing reasons, it is

ORDERED that the Defendant Union's motion to dismiss for failure to state a claim under E.R.I.S.A. is DENIED.

The Court would note that nothing in this motion is designed to infer a finding or conclusion on the merits of the claims of the complaint. It is fair to note, however, that Plaintiffs have a heavy burden in completing the full circle of their litigation, given the broad and sweeping nature of the claims and the dearth of evidence in support of them thus far.

ENTER: June 2nd, 1983.

/s/ _____
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. Attest: Thomas F. Stafford, Clerk, U.S. District Court, Northern District of West Virginia

By: _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 83-0036-W

EDWARD DHAYER, *et al.*,

Plaintiffs,

vs.

WEIRTON STEEL DIVISION OF NATIONAL STEEL CORPORATION, and INDEPENDENT STEELWORKERS UNION,

Defendants.

FINAL JUDGMENT AS TO CERTAIN CLAIMS

ORDERED, ADJUDGED AND DECREED, that:

1. The terms of sale proposed to amend the 70/80 and Rule-of-65 retirement provisions of the National Steel Corporation Retirement Program, Plan 001, to the effect that the sale of assets of the Weirton Steel Division of National Steel Corporation to the Weirton Steel Corporation does not constitute an event giving rise to entitlement to, or eligibility for 70/80 or rule-of-65 retirement benefits, or constitute the lack of suitable long term employment, do not violate:

(a) Provisions of ERISA (29 U.S.C. § 1106) relating to prohibited transactions;

(b) Provisions of ERISA (29 U.S.C. § 1104) relating to fiduciary duties imposed upon National Steel Corporaton;

(c) Provisions of ERISA (29 U.S.C. §§ 1102, et seq., 1056(a) and 1053) relating to vested, accrued or non-forfeitable benefits; or

(d) Provisions of the National Steel Corporation Retirement Program, Plan 001.

2. The terms of sale proposed to amend the severance allowance provisons of the National Steel policy on termination

of exempt salaried employees, to the effect that the sale of assets of the Weirton Steel Division of National Steel Corporation to the Weirton Steel Corporation does not constitute an event giving rise to entitlement to, or eligibility for severance allowance does not violate:

(a) Provisions of ERISA (29 U.S.C. § 1106) relating to prohibited transactions;

(b) Provisions of ERISA (29 U.S.C. § 1104) relating to fiduciary duties imposed upon National Steel Corporation;

(c) Provisions of ERISA (29 U.S.C. §§ 1102, et seq., 1056(a) and 1053) relating to vested, accrued or non-forfeitable benefits; or

(d) Provisons of said policy itself.

3. As to Defendant Independent Steelworkers Union, the plaintiffs' complaint is dismissed with prejudice, pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

Approved:

Entered: September 21, 1983

Robert E. Maxwell
United States District Judge

Entered: September 21, 1983

Thomas F. Stafford 1077
THOMAS F. STAFFORD
United States District Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 83-0036-W

EDWARD DHAYER, *et al.*,

Plaintiffs,

vs.

WEIRTON STEEL DIVISION OF NATIONAL STEEL CORPORATION, and INDEPENDENT STEELWORKERS UNION,

Defendants.

ORDER DIRECTING ENTRY OF FINAL JUDGMENT AS TO CERTAIN CLAIMS AND DETERMINATION THAT NO JUST CAUSE EXIST FOR DELAY PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendants National Steel Corporation and the Independent Steelworkers Union have filed a joint motion requesting entry of final judgment as to certain claims adjudicated in the prior Memorandum Opinion and Order of this Court entered September 8, 1983 and filed September 12, 1983, and a determination that there is not just cause for delay in entering final judgment with respect to the claims adjudicated pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Upon consideration of the Joint Motion of Defendants, it is expressly determined that there is no just cause to delay the entry of final judgment as to the certain claims adjuciated in such Memorandum Opinion and Order and it is

ORDERED that final judgment be entered in the form of judgment attached to this Order.

Entered: September 21, 1983

Robert E. Maxwell
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. Attest: Thomas F. Stafford Clerk, U.S. District Court Northern District of West Virginia

BY: Sue O. Abraham
SUE O. ABRAHAM
Deputy Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-2004
No. 83-0036-W

EDWARD DHAYER; EDWARD BITTNER; RICHARD BLANCATO and JAMES H. BROWNING, *et al.*,
Appellants,

v.

WEIRTON STELL DIVISION OF NATIONAL STEEL CORPORATION and INDEPENDENT STEELWORKING UNION,
Appellees.

FILED DEC 30 1983
U.S. Court of Appeals Fourth Circuit

A True Copy. Teste: William K. Slate, II, Clerk

Appeal from the United States District Court for the Northern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Northern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1569
No. 83-0040

GERALD W. BRUNNER; CLARENCE RIFKEE; NORMAN CLARK; JAMES HOGE and all others similarly situated,

Appellants,

v.

NATIONAL STEEL CORPORATION; INDEPENDENT STEELWORKERS UNION; WIETON JOINT STUDY COMMITTEE, INC. and PENSION AGREEMENT BETWEEN THE NATIONAL STEEL CORPORATION AND THE INDEPENDENT STEELWORKERS UNION,

Appellees.

FILED DEC 30 1983
U.S. Court of Appeals Fourth Circuit

A True Copy. Teste: William K. Slate, II, Clerk

Appeal from the United States District Court for the Northern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Northern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION
No. 83-0035-W

NOTICE OF APPEAL

EUGENE R. SUTTON, RAYMOND LUDEWIG, PAUL D. ALEXANDER, ANTHONY J. ANGELO, HOHN P. BARLAS, THOMAS V. BARNHOUSE, WILLIAM BELL, WALTER BIRELL, PETE BRIER, CAMDEN BUMGARNER, WILLIAM D. BURCH, GLENN L. BURDICK, ROBERT F. BALDWIN, MYERS D. CAMPBELL, HOMER R. CAMERON, JOSEPH CANDAL, JR., NOEL A. CANTIN, RAYMOND CAPARROS, JAMES W. CARDUCCI, MILTON CARAN, HERBERT A. CHAPMAN, WILLIAM H. CHAPELL, ANDREW CHICOVIC, GLENN L. CHIVERS, HENRY H. COOPER, VONLIE COOPER, FRANK V. CYBULSKI, GEORGE R. DANFORD, DONALD DAVIDSON, RONALD E. DAVIS, CARALES L. DAWSON, CARL G. DULANEY, GERALD D. DENNIS, RICHARD W. DEENEN, FRANK E. DIPIETRO, SR., NICHOLAS S. DEDERICK, WARREN D. DUNLAP, WILLIAM H. EASTHAM, MERLE H. ETHERIDGE, RUSSELL EVANS, ANDREW EVANO. DONALD A. FARMER, KENNETH E. FARMER, CECIL E. FAULK, WALTER FISHER, WARREN L. FLANAGAN, GEORGE C. FOLDI, SR., DAVID H. FRANTZ, EDGAR K. GAUMER, PAUL A. GERAD, ROBERT A. GIANNAMORE, RALPH GORRELL, SR., ROBERT GREGSON, JR., ROBERT W. HAMILTON, HOHN W. HANEY, JR., ROBERT E. HANEY, CHARLES M. HAYES, JAMES E. HELTON, RIVHARD A. HIXENBAUGH, JAMES M. HOFFMAN, JAMES A. HOGE, HOWARD D. KEENAN, ROY E. KING, HAROLD G. HUGGINS, JOSEPH G. IZZI, STANLEY JANOSKI, HARRY D. JONES, EDWARD J. KLAKOS, MELVIN KOSTUR, STANLEY KRUPINSKI,

DANIEL KUKICH, JAMES E. LASLO, CHARLES W. LATIMER, RICHARD D. LAW, ROBERT G. LEMASTERS, LEE W. LIBENGOOD, JOSEPH W. LIPAN, JR., JAMES M. LIVINGSTON, JR., JOHN G. McCLASKEY, DANA C. McCLELLAND, BENNY MCDLOSKY, CHARLES McCONNELL, JOHN J. MCELWAIN, WILLIAM J. McHUGH, GEORGE J. McLAUGHLIN, CHARLES E. METZ, JOHN W. MILEWSKY, JOHN H. MISCH, STEVEN A. MODRANSKI, JR., FRED R. MOORE, ROY MOOREHEAD, HERBERT D. MORRIS, GEORGE T. MURRAY, LOUIS NAGY, SANDINON Q. ORSINI, ROY R. OWENS, EARL W. PATTERSON, JOSEPH A. PASQUARELLA, STANFLEY A. PAWLIN, ALBERT A. PETRELLA, DWAIN E. POLAND, TED F. POLING, ELWOOD L.POPISH, PAUL E. PUGH, JOHN N. HUGHES, WENDALL JONES, HILBERT W. PYLES, FLOYD C. RABE, RICHARD K. RAINERI, JOHN P. RALSTON, FRANK (FRANCIS) REA, ODELL RECTOR, SAMUEL E. RICHARDS, CLEMENS ROCCHIO, JAMES E. RYAN, LESLIE W. SHUMAN, EDWARD G. SEMBAR, CLARENCE W. SIMS, EDWIN N. SINILA, DONALD W. SMITH, DALE SMITH, GEORGE W. SMITH, JACK H. SMITH, ROBERT L. SMITH, VICTOR SOGAN, ROBERT L. STARKEY, ROSE MARIE STARKEY, ROBERT STILL, GARY M. STRAIGHT, FLOYD D. SWAIN, EUGENE A. SWEITZER, RICHARD TOKER, HERBERT L. UTZLER, EDWIN R. WEAVER, THOMAS R. WEDLAKE, RAYMOND M. WENZOWSKI, ARDEN R. WESTFALL; ARTHUR C. WHARTON STANLEY D. WILLEY, WILLIAM W. WILLOUGHBY, R. W. WILSON, THOMAS WINLAND, FRANK B. MATEUSIAK, JAMES L. LESKO, JOHN J. KUCZYKOWSKI, SYDNEY E. GIVENS, GLEN V. COTTRILL, LEO R. BURTON, ADRIAN BURNWORTH, JAMES P. BURKETT, LAWRENCE A. RAWSON, JOE H. RADIVOJ, JR., BYRON L. MESSER, LESLIE T. MARTIN, CHARLES W. BAIER, HAROLD E. MASTERS, RAY J. WILLIAMS, THOMAS J. WIGNER, CHARLES M. TORTIS, WILLIAM O. JONES, ALFONSO

J. CILONE, WILLIAM J. HOUSER, ARTHUR E. FERNANDEZ, JOHN E. WOJCIK, ANTHONY J. PELLEGRINO, JAMES S. CLARK, CHARLES R. CUNNINGHAM, HAROLD E. WILLIS, ROBERT D. ROBINSON, ERNEST W. FITHYAN,

Plaintiffs,

v.

WEIRTON STEEL DIVISION OF NATIONAL STEEL CORPORATION, *et al.*,

defendants.

Notice is hereby given that the following Plaintiffs appeal to the United States Court of Appeals for the Fourth Circuit from the final judgment entered by the Court on the 14th day of September, 1983, and foled and entered by the Clerk of Courts on September 15, 1983, granting final judgment to defendants with respect to certain claims decided by memorandum decision, dated July 8, 1983.

Eugene R. Sutton
Raymond Ludewig
Paul D. Alexander
Anthony J. Angelo
John P. Barlas
Thomas V. Barnhouse
William Bell
Walter Birrell
Pete Brier
Camden Bumgarner
William D. Burch
Glenn L. Burdick
Robert F. Baldwin
Myers D. Campbell
Homer R. Cameron
Joseph Candal, Jr.
Noel A. Cantin
Raymond Caparros
James W. Carducci
Milton Ceran
Herbert A. Chapman
William H. Chapell
Andrew Chicovic
Glenn L. Chivers
Henry H. Cooper
Vonlie Cooper
Ralph Gorrell, Sr.
Robert Gregson, Jr.
Robert W. Hamilton
John W. Haney, Jr.
Robert E. Haney
Charles M. Hayes
James E. Helton
Richard A. Hixenbaugh
James M. Hoffman
James A. Hoge
Howard D. Keenan
Roy E. King

Harold G. Huggins
Frank V. Cybulski
George R. Danford
Donald Davidson
Ronald E. Davis
Carles L. Dawson
Carl G. Dulaney
Gerald D. Dennis
Richard W. Deenen
Neil E. Dennis
Frank E. DiPietro, Sr.
Nicholas S. Dederick
Warren D. Dunlap
William H. Eastham
Merle H. Etheridge
Russell Evans
Andrew Evano
Donald A. Farmer
Kenneth E. Farmer
Cecil E. Faulk
Walter Fisher
Warren L. Flanagan
George C. foldi, Sr.
David H. Frantz
Edgar K. Gaumer
Paul A. Gerad
Robert A. Giannamore
Hilbert W. Pyles
Floyd C Rabe
Richard K. Raineri
John P. Ralston
Frank (Francis) Rea
Odell Rector
Sameul E. Richards
Clemens Rocchio
James E. Ryan
Leslie W. Shuman
Edward G. Sembar
Clarance W. Sims
Edwin N. Sinila
Joseph G. Izzi
Stanley Janoski
Harry D.Jones
Edward J. Klakos
Melvin Kostur
Stanley Krupinski
Daniel Kukich
James E. Laslo
Charles W. Latimer
Richard D. Law
Robert G. Lemasters
Lee W. Libengood
Joseph W. Lipan, Jr.
James M. Livingston, Jr.
John G. McClaskey
Dana C. McClelland
Benny McClosky
Charles McConnell
John J. McElwain
William J. McHugh
George J. McLaughlin
Charles E. Metz
John H. Misch
Steven A. Modranski, Jr.
Fred R. Moore
Roy Moorehead
Herbert D. Morris
George T. Murray
Louis Nagy
Sandino Q. Orsini
Roy R. Owens
Earl W. Patterson
Joseph A. Paaquarella
Stanley A. Pawlin
Albert A. Petrella
Dwain E. Poland

Ted F. Poling
Elwood L. Popish
Paul E. Pugh
John N. Hughes
Wendall Jones
Alfonso J. Cilone
Donald W. Smith
Dale Smith
George W. Smith
Jack H.Smith
Robert L.Smith
Victor Sogan
Robert L. Starkey
Rose Marie Starkey
Robert Still
Gary M. Straight
Floyd D. Swain
Eugene A. Sweitzer
Richard Toker
Herbert L. Utzler
Edwin R. Weaver
Thomas R. Wedlake
Raymond M. Wenzowski
Arden R. Wharton
Stanley D. Willey
William W. Willoughby
R. W. Wilson
Thomas Winland
Frank B. Mateusiak
James L. Lesko
John J. Kuczykowski
Sydney E. Givens
Glen V. Cottrill
Leo R. Burton
Adrian Burnworth
James P. Burkett
Lawrence A. Rawson
Joe H. Radivoj, Jr.
Byron L. Messer
Leslie T. Martin
Charles W. Baier
Harold E. Masters
Ray J. Williams
Thomas J. Wigner
Charles M. Tortis
William O. Jones

James S. Clark
William J. Houser
Arthur E. Fernandez
John E. Wojcik
Anthony J. Pellegrino
Charles R. Cunningham
Harold R. Willis
Robert D. Robinson
Ernest W. Fithyan
Et. al., if any listed
Plaintiffs

Respectfully submitted,

SPON & FOURNIER

by: JOHN RANDOLPH SPON, JR.
John Randolph Spon, Jr.
Attorney for the Plaintiffs/
Appellants

Suite 904-911
Ameritrust Bank Building
Steubenville, Ohio 43952
(614) 282-3600

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 1983, a copy of the foregoing Notice of Appeal was mailed by regular U.S. Mail, postage prepaid, to Carl H. Hellerstedt, Jr., On Riverfront Center, Pittsburgh, Pennsylvania 15222, Attorney for Defendants National Steel Corporation and National Steel Corporation Retirement Plan, David L. Robertson, 3147 West Street, Weirton, West Virginia 26062, Attorney for Defendant Independent Steelworkers Union, Anthony F. Phillips, One Citicorp Center, 153 East 53rd Street, New York, New York 10022, Attorney for Defendant Weirton Joint Study Committee, and Barry Laine, Attorney for Brunner, et al., 400 Dollar Bank Bldg., P.O. Box 849, Youngstown, Ohio 44501.

SPON & FOURNIER

by: JOHN RANDOLPH SPON, JR.
John Randolph Spon, Jr.
Attorney for the Plaintiffs/
Appellants

Suite 904-911
Ameritrust Bank Building
Steubenville, Ohio 43952
(614) 282-3600

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION 83-0036-W

NOTICE OF APPEAL

EDWARD DHAYER, EDWARD BITTNER, RICHARD BLANCATO, JAMES H. BROWNING, WILLIAM R. DUNCAN, JR., DOMENIC F. FRIO, WILLIAM F. GARRISON, DAVID R. HARBIN, ROBERT E. HESS, JERRY G. JOONES ROBERT L. JONES, LLOYD A. KLAGES, CHARLES D. MURRAY, CHARLES PRINCE, WILLIAM B. RIGGS, DONALD L. WHITE, FRANCIS BAIER, BERNARD A. DEKU, ROBERT A. DEKU, DANIEL T. DIAMOND, JOSEPH M. DUMBOVICH, ARTHUR E. FERNANDEZ, ROBERT EDWARD GRIFFITH, DAVID F. GRIMM, PATRICK. S. GURREARA, BRUCE K. LEMASTER, ALBERT L. MONSEAU, JOSEPH PETRELLE, ENNIO RASICCI, CHARLES E. WAGNER, JOHN E. WOJCIK

Plaintiffs

v.

NATIONAL STEEL CORPORATION, *ET AL.*,

Defendants

Notice is hereby given that Plaintiffs Edward Dhayer, Edward Bittner, Richard Blancato, James H. Browning, William R. Harbin, Robert E. Hess, Jerry G. Jones, Robert L. Jones, Lloyd A. Klages, Charles D. Murray, Charles Prince, William B. Riggs, Donald L. White, Francie Baier, Bernard A. Deku, Robert A. Deku, Daniel T. Diamond, Joseph M. Dumbovich, Arthur E. Fernandez, Robert Edward Griffith, David F. Grimm, Patrick S. Gurrera, Bruce K. LeMaster, Albert L. Monseau, Joseph Petrelle, Ennio Rasicci, Charles E. Wagner,

and John E. Wojcik appeal to the United States Court of Appeals for the Fourth Circuit from Order and Final Judgment entered by the Court on September 21, 1983 granting final judgment to defendants with respect to certain claims decided by Memorandum Decision dated September 8, 1983.

Respectfully submitted,

SPON & FOURNIER

by: JOHN RANDOLPH SPON, JR.
John Randolph Spon, Jr.
Attorney for the Plaintiffs/
Appellants

Suite 904-911
Ameritrust Bank Building
Steubenville, Ohio 43952
(614) 282-3600

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 1983, a copy of the foregoing Notice of Appeal was mailed by regular U.S. Mail, postage prepaid, to Carl H. Hellerstedt, Jr., On Riverfront Center, Pittsburgh, Pennsylvania 15222, Attorney for Defendants National Steel Corporation and National Steel Corporation Retirement Plan, David L. Robertson, 3147 West Street, Weirton, West Virginia 26062, Attorney for Defendant Independent Steelworkers Union, Anthony F. Phillips, One Citicorp Center, 153 East 53rd Street, New York, New York 10022, Attorney for Defendant Weirton Joint Study Committee, and Barry Laine, Attorney for Brunner, et al., 400 Dollar Bank Bldg., P.O. Box 849, Youngstown, Ohio 44501.

SPON & FOURNIER

by: JOHN RANDOLPH SPON, JR.
John Randolph Spon, Jr.
Attorney for the Plaintiffs/
Appellants

Suite 904-911
Ameritrust Bank Building
Steubenville, Ohio 43952
(614) 282-3600

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 83-0035-W
Civil Action No. 83-0036-W
Civil Action No. 83-0040-W

EUGENE R. SUTTON, *et al.*,

Plaintiffs

v.

WEIRTON STEEL DIVISION OF NATIONAL STEEL COPRORATION; *et al.*,

Defendants.

AFFIDAVIT OF WILLIAM W. WILLOUGHBY

STATE OF OHIO)
) SS:
COUNTY OF JEFFERSON)

Now comes William W. Willoughby, who being duly cautioned and sworn, states the following:

1. I am a plaintiff in the above entitled action, and reside at 1202 Wentworth Avenue, Toronto, Ohio.

2. I was originally employed by defendant National Steel Corporation in 1951, and have since continued in such employ for the past 32 years as an hourly employee.

3. During all times mentioned in the above action, I have been and remain a dues paying member of defendant Independent Steelworkers Union.

4. I was an active member of the Joint Study Committee from its inception through August 1, 1982 and as such member,

was present at numerous meetings involving the proposed sale of the Weirton Steel Division.

5. For the past several years, I have relied upon all provisions of Plan 001, including a supplemental pension in the event of National Steel Corporation ceasing its operations, as a term, condition, and benefit of my employment.

6. National Steel Corporation has threatened the members of the Joint Study Committee and the employees of the Weirton Steel Division, that unless I and other employees relinquish our $400.00 supplemental pension shut down rights by entering into an ESOP sales agreement which has as a material provision amending Plan 001 to do away with such supplemental pension, it will commence laying off hundreds of employees and relegate the Weirton Steel Division as a finishing mill with a mere few hundred employees.

7. Under the proposed ESOP sales agreement, National Steel Corporation, a solvent corporation, will transfer approximately $770,000,000 of its pension and other obligations to the proposed insolvent new Weirton Steel Corporation, under circumstances wherein steel industry experts are advising continual decline of the domestic steel industry, a rapid change from an industrial to a technological society, and an increasing influx of foreign steel into American markets.

8. Under the proposed ESOP sales agreement, unless the net worth of the new Weirton Steel Company exceeds $100 Million Dollars within five years of the sale, it must commence paying in the sixth year two-thirds of its entire net profit after taxes to the National Steel Corporation as consideration for the sale, even though consulting studies indicate that the new Weirton Steel Company must also further accumulate an additional One Billion Dollars to upgrade the plant to a competitive level for survival.

9. As a former member of the Joint Study Committee, and as an hourly employee to present, I have not been advised of the probable success of the new Weirton Steel Company, and I believe that no expert or steel industry consultant in the

United States has provided an opinion stating that the new Weirton Steel Company has a probability of succeeding under the proposed ESOP sale, and for this and other reasons I believe the proposed sale creates an unreasonable risk to my supplemental pension and is clearly an imprudent act.

10. I further have reason to believe that the totality of ciurcumstances presently existing have been orchestrated by the National Steel Corporation for purposes of avoiding over $123 Million Dollars of pension obligations which it failed to fund. I believe this to be true because on or about March 11, 1983, in-house counsel for the National Steel Corporation, Attorney William Doepken advised Carl Valdiserri, a member of the Joint Study Committee, that National Steel Corporation "would not complete a deal if they were liable for these plans" (i.e., the present Plan 001).

11. Further, I believe National Steel Corporation has orchestrated and coerced some salaried members of the Joint Study Committee to signing an Agreement in Principle dated March 11, 1983 which to date, purports to reflect the proposed Agreement. I believe this to be true because on the date of signing the Agreement in Principle, but prior to the signing, Mr. Carl Valdiserri, a member of the Joint Study Committee and Vice-President of the Weirton Steel Corporation advised the salary members of the Joint Study Committee that "if the salary members of the Joint Study Committee did not sign this agreement . . . National Steel could come in and 'CLEAN HOUSE.' "

12. Further, National Steel Corporation is orchestrating a fraudulent scheme to give away its liabilities to desperate and naive employees through the use of an ESOP plan, and pursuant to the same, take away that particular supplemental benefit under Pension Plan 001 which was always intended to be mine if National Steel Corporation would cease operations, regardless of their reason for such cessation. It is a fraudulent ESOP scheme for many reasons including National Steel Corporation's false statements to it shareholders and employ-

ees regarding their initial reason for their announcement of intent to sell, which through its public oral statements and 1982 Annual Report stated: "Studies showed that Weirton's employees were not likely to grant to National sizable wage concessions required for Weirton's survival."

I believe such statement to be unequivocally fabricated, false, and misleading, because on or about March 1 or March 2, 1982, at the Grant Building in Pittsburgh, Pennsylvania, Mr. Jack Redline, the I.S.U. Executive Committee, Attorney Dave Robertson, and myself met personally with Mr. Howard M. Love, Chairman and Chief Executive Officer of National Steel Corporation. At this meeting, Mr. Love stated that National Steel Corporation must either sell the Weirton Steel Division plant or phase it down to a finishing mill because it "wasn't getting enough return on the investment." Mr. Redline then asked if National Steel Corporation would reconsider if Weirton's employees would accept a $10.00 per hour wage concession. I can say without any doubt that Mr. Love's response was the following:

> "We aren't asking for concessions, we don't want concessions . . . we want out from under the Weirton Steel Division. . . ."

13. I believe that Mr. Love's statements under the circumstances then existing and under the present circumstances can reasonably be interpreted to mean that National Steel Corporation wants "out from under the Weirton Steel Division" pension and severance obligations."

14. I believe that the conduct of National Steel Corporation, a fiduciary under Plan 001, and those acting in concert with them, for the foregoing reasons and other reasons were acts of self-dealing, dual loyalty, and without "an eye single" toward the sole, and exclusive purpose of benefitting Plan 001 beneficiaries, and that the proposed and intended 11th Hour Amendment to said Plan 001 in the shadow of the termination circumstances constitutes a prohibited transaction under ER-

ISA, and breach of their fiduciary obligations and imprudent act upon me and my rights and benefits.

Affiant further sayeth not.

WILLIAM W. WILLOUGHBY
Affiant-Plaintiff

Taken, sworn to and subscribed befor me this 25th day of May, 1983.

JOHN RANDOLPH SPON, JR.
Notary Public
Lifetime Attorney's Commission
State of Ohio
County of Jefferson

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 83-0035-W

EUGENE R. SUTTON, RAYMOND LUDEWIG, PAUL D. ALEXANDER, ANTHONY J. ANGELO, JOHN P. BARLAS, *et al.*,

Plaintiffs

v.

WEIRTON STEEL DIVISION OF NATIONAL STEEL COPRORATION; NATIONAL STEEL CORPORATION RETIREMENT PROGRAM and INDEPENDENT STEELWORKERS UNION,

Defendants.

Civil Action No. 83-0040-W

GERALD W. BRUNNNER, CLARENCE RIFFEE, NORMAN CLARK, JAMES HOGE, *et al.*,

Plaintiffs

v.

NATIONAL STEEL CORPORATION; INDEPENDENT STEELWORKERS UNION; WEIRTON JOINT STUDY; PENSION AGREEMENT BETWEEN THE NATIONAL STEEL CORPORATION AND THE INDEPENDENT STEELWORKERS UNION and INDEPENDENT STEELWORKERS UNION,

Defendants.

Civil Action No. 83-0036-W

EDWARD DHAYER, EDWARD BITTNER, RICHARD BLANCATO, JAMES H. BROWNING, *et al.*,
Plaintiffs

v.

WEIRTON STEEL DIVISION OF NATIONAL STEEL CORPORATION and INDEPENDENT STEELWORKERS UNION,
Defendants.

AFFIDAVIT OF DAVID KASS

David Kass, being first duly sworn, deposes and days:

1. I am a actuary and have performed actuarial services for approximately thirty years. I have been a Fellow of the Society of Actuaries since 1959, and became a charter member of the American Academy of Actuaries in 1965. I am presently associated with Kass, Germain & Company, which I established in 1971.

2. I specialize in consulting work for employee benefit plans, and over eighty percent of my consulting work involves qualified pension plans. In 1976, I was in the original group of enrolled actuaries recognized by the Joint Board established by Employment Retirement Income Security Act (ERISA). I am thoroughly familiar with ERISA and have worked on a regular and consistent basis with the Act since its passage.

3. Minimum funding standards are established in 26 U.S.C. Section 412. 26 U.S.C. Section 412(c)(3) provides:

> "Actuarial assumptions must be reasonable. For purposes of this section, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which,

in combination, offer the actuary's best estimate of anticipated experience under the plan."

Regulations issued by IRS under this Code Section provide no further specific guidance concerning the actuarial assumptions to be used in valuing Plan obligations triggered by Plant Shutdown, such as those commonly negotiated in the Steel Industry which are known as "Rule of 65" or "70/80" retirement benefits; funding for such benefits, consequently, would be a judgment decision for the Plan Actuary in light of the statutory language cited above. Given the present condition of the domestic steel industry, National Steel's position with respect to the Weirton Division, and reasonable expectations of future events, it is my opinion that an actuary would have to give serious consideration to the likelihood of shutdown of the Weirton Division for the purpose of evaluating Plan liabilities under the "70/80" and "Rule of 65" shutdown benefits in arriving at the funding requirements of the Plan.

4. In determing the assets of a pension fund, an actuary would take into account expected future contributions. Expected contributions (if any) with respect to the Rule of 65 or 70/80 provisions would accordingly be considered assets of the fund. Similarly, it would be accepted actuarial practice for an actuary to take into account liabilities such as the Rule of 65 or 70/80 retirement provisions.

Further Affiant sayeth naught.

DAVID KASS

STATE OF OHIO)
) SS
COUNTY OF CUYAHOGA)

Sworn to and Subscribed before me this 23 day of June, 1983.

NOTARY PUBLIC

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No. 83-1584 and No. 83-1576

Office - Supreme Court, U.S.
FILED
APR 25 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

GERALD W. BRUNNER, *et al.*,
Petitioners,

—v.—

NATIONAL STEEL CORPORATION, *et al.*,
Respondents.

EUGENE R. SUTTON, *et al.*,
Petitioners,

—v.—

WEIRTON STEEL DIVISION OF
NATIONAL STEEL CORPORATION, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

ANTHONY F. PHILLIPS
(Counsel of Record)
WILLKIE FARR & GALLAGHER
153 East 53rd Street
New York, New York 10022
(212) 935-8000

BOGARAD & ROBERTSON
3147 West Street
Weirton, West Virginia 26062
(304) 748-0828

Attorneys for Respondents Weirton Joint Study Committee, Inc. and Independent Steelworkers Union

Of Counsel:

GERALD KERNER
BRIAN E. O'CONNOR
LAURENCE H. LENZ, JR.
DAVID L. ROBERTSON

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court below erred in holding that an employer may, in the context of arms-length negotiations with representatives of its u ion and nonunion employees for the employee purchase of certain facilities operated by the employer, seek, as a pre-condition for the sale, amendments to collectively bargained and voluntary benefit plans of which it is an administrator and which are subject to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982) ("ERISA"), which clarify that the sale would not constitute an event triggering employee entitlement to certain contingent nonvested benefits?

2. Whether the court below erred in holding that a sale of corporate assets, the terms of which required modification of certain employee pension and severance benefit plans, did not involve a prohibited transaction in violation of section 406 of ERISA, 29 U.S.C. § 1106 (1982), when no funds, property or like assets of the plans were utilized to further the acquisition and the plans were not parties to the sale?

3. Whether the court below erred in holding that the district court did not abuse its discretion in granting summary judgment in favor of respondent Independent Steelworkers Union on issues previously reserved in a motion to dismiss, when petitioners were fully aware of, and briefed, those issues after having earlier presented live testimony from their own witnesses together with other evidence and had cross-examined at length respondents' witnesses including the president of the union at a full evidentiary hearing regarding those issues?

PARTIES TO THE PROCEEDINGS

The petitoners seek review of three actions which were consolidated below: ***Brunner, et al., v. National Steel Corporation, et al.; Sutton, et al. v. Weirton Steel Division of National***

Steel Corporation, et al. and *Dhayer, et al. v. Weirton Steel Division of National Steel Corporation, et al.*

Respondent Weirton Joint Study Committee, Inc. was a party to the *Brunner* action. It is a not-for-profit corporation existing under the laws of the State of West Virginia having no subsidiaries or other corporate affiliations.

Respondent National Steel Corporation was a defendant in the *Brunner, Sutton* and *Dhayer* actions.[1] National will be submitting a separate brief in opposition to the petitions herein which will list its subsidiaries and corporate affiliations.

Respondent Independent Steelworkers Union was a named defendant in all three actions. It is an incorporated labor organization existing under the laws of the State of West Virginia having no subsidiaries or other corporate affiliations. It is the recognized collective bargaining representative for each petitioner in the *Brunner* action and the majority of petitioners in the *Sutton* action.

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[1] The named defendant in the *Sutton* and *Dhayer* actions was "The Weirton Steel Division of National Steel Corporation." Since the culmination of the transactions which gave rise to these actions, the Weirton Steel Division, which never had a separate legal identity from National Steel Corporation, for practical purposes no longer exists. Its assets were sold to Weirton Steel Corporation, an independent employee-owned corporation existing under the laws of the State of Delaware. Weirton Steel Corporation has no subsidiaries or other corporate affiliations. It was not a party to the proceedings below, and is not a respondent herein.

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No. 83-1584 and No. 83-1576

IN THE

Supreme Court of the United States

October Term, 1983

GERALD W. BRUNNER, *et al.*,
Petitioners,

—v.—

NATIONAL STEEL CORPORATION, *et al.*,
Respondents.

EUGENE R. SUTTON, *et al.*,
Petitioners,

—v.—

WEIRTON STEEL DIVISION OF
NATIONAL STEEL CORPORATION, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondents Weirton Joint Study Committee, Inc. (the "Committee"), and Independent Steelworkers Union ("ISU") (collectively referred to, along with National Steel Corporation,

as "Respondents"), submit this brief in opposition to the Petitions for Writs of Certiorari filed by the appellants in the actions entitled *Brunner, et al. v. National Steel Corporation, et al.* in No. 83-1584 ("*Brunner* Petition") and *Sutton, et al. v. Weirton Steel Division of National Steel Corporation, et al.* and *Dhayer, et al. v. Weirton Steel Division of National Steel Corporation, et al.* in No. 83-1576 ("*Sutton* Petition").[2] This Brief will respond to both petitions which seek review of the same decision below.

STATEMENT OF THE CASE

These actions arise out of the decision by National Steel Corporation ("National") to downsize the operations at its Weirton Steel Division (the "Division") and the efforts of the ISU and representatives of the Division's nonunion employees to preserve the jobs of thousands of Division employees. Those efforts, following prolonged and intensive arms-length negotiations between National and representatives of the Division's employees, culminated in a complex series of transactions by which National sold substantially all of the assets of the Division as an ongoing business to the newly formed, employee-owned Weirton Steel Corporation ("Weirton Steel").

Petitioners have sought to thwart these efforts, and the collective bargaining and negotiating process, in an attempt to secure for themselves certain "shutdown" benefits despite the fact that, after the sale, they continued to possess the same benefits they held as Division employees, they were not deprived of a moment's employment and they obtained an ownership interest in the new company. To this end, petitioners urged the courts below to adopt a strained interpretation of sections 404 and 406 of ERISA which is contrary to the clear language and intent of ERISA and prior decisions of this Court.

Petitioners further urged the district court to substitute its judgment for that of the ISU by finding that the ISU had

[2] The appellants in the *Brunner, Sutton* and *Dhayer* actions are collectively referred to herein as "petitioners."

breached its duty of fair representation by reviewing, accepting and endorsing the recommendations of the Committee which had retained independent, outside expert consultants to explore the feasibility of an employee-owned corporation and later to formulate a proposal for the sale of the Division's assets to Weirton Steel. When the district court declined to exceed the traditional bounds of judicial involvement in the collective bargaining process, and was unable to find any factual support for petitioners' unfair representation claims, petitioners urged the Court of Appeals to reverse the district court on the grounds of alleged procedural irregularity, despite the fact that petitioners were unable to demonstrate any error in the district court's determination, or prejudice resulting from the procedure employed.

The Court of Appeals affirmed the district court's judgment in favor of respondents, refusing to depart from precedent established by this Court and consistently followed by the Courts of Appeals, or to adopt the unrealistic interpretation of ERISA urged by petitioners. Furthermore, the Court of Appeals refused to reverse the district court's grant of summary judgment in favor of the ISU, finding that any technical error that may have occurred was harmless given the procedural history of this action.

Petitioners now seek to have this Court review that decision. But as demonstrated below, the issues involved do not warrant review by this Court, and the Petitions for Writs of Certiorari should be denied.

STATEMENT OF FACTS

Despite having presented, at a full evidentiary hearing, live testimony from their own witnesses and having cross-examined respondents' witnesses at length regarding the issues raised in their complaints, petitioners were unable to demonstrate the existence of a question of fact with respect to any of their allegations. In their petitions to this Court, petitioners choose simply to ignore the facts which both courts below found to be

conclusively established by uncontroverted evidence and to reassert their naked allegations. Contrary to those allegations, the *facts* that were conclusively established below follow:

A. Background

The Division was one of the largest integrated steelmaking facilities in the United States. After years of continuing decline from a peak employment of 16,000 workers, the Division employed, at the time of sale, in excess of 7,000 workers and was the largest single-site employer in the State of West Virginia. *Brunner* Appendix at A2.[3]

In early 1982, National announced that it had embarked on a program of "downsizing" its steelmaking facilities to the extent necessary to meet market demand and earn a return for its stockholders. Consistent with that policy, and with continued weak demand for orders, National took steps to trim operations at the Division and its other steelmaking facilities. Had the acquisition of the Division's assets not been consummated, the Division would have eventually been further "downsized" to a mere finishing operation for steel produced elsewhere and may ultimately have closed altogether. *Brunner* Appendix at A2; A38.

More than 2,000 Division employees were on layoff at the time Weirton Steel acquired the Division's assets. These layoffs had resulted in substantial suffering and hardship on the part of the unemployed workers and their families, as well as the local merchants, suppliers, vendors, governmental entities and charitable and social organizations in the surrounding communities in West Virginia, Ohio and Pennsylvania, which are dependent on the employees' income, or which provide for their welfare. These hardships, however, pale when compared with those that would have eventually resulted from the continued downsizing of the Division. *Brunner* Appendix at A6.

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[3] The opinions of the courts below in the *Brunner, Sutton* and *Dhayer* actions are provided to the Court in the appendices to the *Brunner* and *Sutton* petitions. Because the opinions are essentially identical, respondents will refer the Court only to the *Brunner* decision unless the context requires reference to the other opinions.

B. The Efforts To Save The Division

In an effort to avoid these hardships, and stave off the personal and economic disaster that would occur as a result of a shutdown of the Division, representatives from the Division's two unions and the Division's nonunion employees formed the Committee to explore the feasibility of an employee purchase of the Division's assets as an ongoing independent employee-owned Weirton Steel. The Committee consisted of twenty-one representatives of the ISU, three representatives of the Independent Guard Union ("IGU") and five members of the Division's management. *Brunner* Appendix at A2-A3; A38.

National took no part in the formation or financing of the Committee, nor did it in any manner dominate or control the Committee to further National's self-interests. Contrary to petitioners' assertion, no genuine issue of material fact exists on this point. *Brunner* Appendix at A3, A13. Furthermore, the findings below were independently endorsed by the Office of the General Counsel for the National Labor Relations Board which found no basis for issuing a complaint against National or the ISU on the grounds of alleged employer domination arising from the presence of the Division's management personnel on the Committee. *See* Appendix to Brief of National Steel Corporation in Opposition to Petitions for Writs of Certiorari.

Petitioners are also wrong in asserting that the nonunion employees, including the *Dhayer* petitioners, were not represented during the negotiations between National and the Committee regarding the sale of the Division's assets. The entire purpose of the management members on the Committee was to afford nonunion employees a voice in the deliberations to which they were not legally entitled and would not otherwise have had. And, although the Committee members were not "representatives" in the collective bargaining sense, there is no evidence in the record below that their interests were antithetical to those of the other nonunion employees of the Division, or that they did not in fact seek to represent adequately the interests of nonunion workers.

Pursuant to its mandate, the Committee retained a nationally prominent business consulting firm to conduct a feasibility study of an employee-owned enterprise. *Brunner* Appendix at A3, A4, A13; A38, A44. The resulting study concluded that an independent Weirton Steel could be a viable business entity if certain labor costs were reduced and efficiencies achieved. *Brunner* Appendix at A3.

Thereafter, the Committee, through its outside counsel and financial advisors, entered into negotiations with National for the purchase of the Division's assets by Weirton Steel. The unions then began negotiating the amendments to the existing collective bargaining agreements with National and representatives of Weirton Steel necessary to effect the creation of an independent employee-owned company.

C. The Terms Of The Acquisition

The result of these negotiations was a series of transactions whereby Weirton Steel acquired the Division's assets as an ongoing business, and all of the outstanding shares of Weirton Steel stock were acquired by an employee stock ownership plan ("ESOP"). Through the ESOP, Weirton Steel employees obtained the entire equity ownership interest in the company and a voice in its management. *Brunner* Appendix at A3.

At issue in these actions is a relatively discrete portion of the transaction involving certain amendments to the existing "70/80" and "Rule-of-65" pension benefits and the severance benefits conferred on union employees by the collective bargaining agreements with National and on nonunion employees under a voluntary benefit program maintained by National.[4]

Insofar as relevant to this appeal, "70/80" retirement benefits were available to qualifying individuals, both union and nonunion, only if their "continuous service [was] broken

[4] The term "pension and severance plan" used in this brief refers to all benefit agreements applicable to union and nonunion employees relevant to the petitions.

by reason of a permanent shutdown of a plant, department or subdivision thereof...." Similarly, under the collective bargaining agreements, qualifying union-represented employees were entitled to a severance allowance when they became unemployed as a result of a permanent "shutdown" of a department or substantial portion thereof. Under National's severance policy for nonunion employees, a severance allowance was payable in the event such employees lost their jobs by reason of a permanent reduction in the work force or an elimination of the job they occupy. "Rule-of-65" retirement benefits were available to qualifying employees, both union and nonunion, whose continuous service was broken by reason of "layoff" and who had "not been offered suitable long-term employment." *Brunner* Appendix at A7, A14-A17.

Under the agreements between National, the ISU and the IGU,[5] the pension and severance plans were amended to clarify that the sale of the Division's assets as an ongoing business to Weirton Steel would not constitute a "shutdown", "layoff" or "lack of suitable long-term employment." National was to make comparable changes to the plans covering nonunion employees. In other words, the creation of an employee-owned corporation by the sale of the Division's assets to Weirton Steel was not to constitute an event automatically entitling employees to "70/80", "Rule-of-65" or severance benefits. *Brunner* Appendix at A7, A18. These amendments were sought by

[5] When these actions were commenced, the subject of petitioners' challenge was an Agreement in Principle, dated March 11, 1983, between National and the Committee on behalf of Weirton Steel. This Agreement was superceded by the "Assets Purchase Agreement" dated as of April 29, 1983 and its related Closing Agreements (collectively referred to as the "Purchase Agreement"), all between National and Weirton Steel. Although the terms of the Purchase Agreement and the Agreement in Principle differ in several respects, those differences are neither relevant nor material to the issues raised in the petitions before this Court. The new collective bargaining agreements between the unions and Weirton Steel, and the amendments to the existing collective bargaining agreements between the unions and National were ratified overwhelmingly by the ISU and IGU memberships on September 23, 1983 and the transaction closed on January 11, 1984.

National as partial consideration for the sale without which National believed the sale would not be in its financial interest.

The pension agreements were also amended to provide for the continuation of pension coverage by National for former Division employees following the sale. Thus, all assets of National's pension plan that are attributable to any past Division employee or employee of Weirton Steel were required to be segregated in a separate trust fund or insurance contract to be available for the exclusive purpose of satisfying vested pension rights of such employees. At the same time, National remains liable for all accrued benefits earned prior to May 1, 1983, a date agreed upon in the Agreement in Principle. In addition, National will remain liable for payment of "70/80" and "Rule of 65" benefits should Weirton Steel cease operations on or before November 1, 1988. *Brunner* Appendix at A17-A18. This five year "safety-net" of shutdown responsibility of National, a former employer, for a future shutdown over which it has no control, provides extraordinary protection to Weirton Steel employees, and was a major concession extracted from National by the ISU and other representatives of the Division's workers.

Notwithstanding petitioners' allegations to the contrary, no Division employee has been denied, as a result of the sale, any benefit to which he had a legitimate expectation. As a threshold matter, the benefits which were amended were "shutdown" benefits. No shutdown of the Division occurred; the entire thrust of the negotiations between National and the Division's employees was to avoid a shutdown. Not a single Division employee missed even a moment's employment as a result of the sale of the Division's assets to Weirton Steel. Indeed, following the sale, Division employees not only continued to have their jobs, they also owned an equity interest in the company which they had not previously enjoyed and which affords them an opportunity to share doubly in the future success of Weirton Steel as both employees and shareholders. *Brunner* Appendix at A22.

Equally important is the fact that between the continued coverage provided under National's benefit plans and the new coverage of the Weirton Steel Corporation Retirement Plan, Weirton Steel employees are currently provided with shutdown benefits identical to, and in some respects better than, those that were available to them as Division employees. National continues to be responsible for shutdown benefits should Weirton Steel be permanently shutdown on or before November 1, 1988. In the event of a partial shutdown or a permanent shutdown occurring after November 1, 1988, identical shutdown benefits are available under Weirton Steel's benefit plans. Even after November 1, 1988, should Weirton Steel lack resources sufficient to provide all available benefits under its plans, National continues to be liable for all pension benefits, other than those contingent on a shutdown, earned prior to May 1, 1983. In addition, National has agreed to recognize service with the new company in determining pension eligibility after the sale, thus enabling all Weirton Steel employees formerly employed by National to qualify sooner for retirement under National's plan by adding their years of service with Weirton Steel to those already accumulated under National. ***Brunner*** Appendix at A17-A18; A39.

In short, as a result of the sale, the employees of the Division have their jobs, an equity interest in an employee-owned corporation and benefits equivalent to those enjoyed as Division employees.

D. Prior Proceedings

1. ***Procedural History***

Petitioners suggest that the courts below summarily dismissed their claims without affording petitioners either notice or an opportunity to develop at least some issue of fact which would have precluded summary judgment. Such is simply not the case.

Shortly after filing their complaints, petitioners in the ***Brunner*** and ***Sutton*** actions moved for temporary restraining orders, and later for preliminary injunctions, enjoining the sale

of the Division's assets under the terms of the Agreement in Principle. The district court conducted consolidated evidentiary hearings on these motions. At these hearings, counsel for all petitioners submitted evidence in the form of affidavits, live testimony from witnesses, and exhibits. Petitioners' counsel also conducted lengthy and detailed cross-examination of respondents' witnesses, including Walter Bish, the president of the ISU, and Carl Valdiserri, Executive Vice President of the Division and one of the principal negotiators on behalf of the Division's nonunion employees. The cross-examination spanned every issue presented in the motions considered below and raised in the petitions to this Court. After receiving this evidence and hearing argument, the district court denied the motions. *Sutton* Appendix at 13a-16a.

On May 24, 1983, National moved for summary judgment in the *Brunner, Sutton* and *Dhayer* actions. At the same time, the ISU filed a motion to dismiss the *Sutton, Brunner* and *Dhayer* claims as to it. The ISU's motion to dismiss the *Brunner* action was joined by the Committee. All issues raised in both the motions to dismiss and National's motion for summary judgment were fully briefed by the *Brunner* petitioners. The *Sutton* and *Dhayer* petitioners chose to ignore the motion to dismiss and did not file briefs, but did respond to the summary judgment motion.

In orders dated June 1, 1983 and June 2, 1983, respectively, the district court granted, in part, the motions to dismiss as to the *ultra vires* claims against the Committee in *Brunner,* and most of the breach of duty claims against the ISU in *Sutton.* Determination of the unfair representation claims in both *Sutton* and *Brunner* was deferred pending consideration of National's motion for summary judgment. *Sutton* Appendix at 91a-97a.

Prior to that consideration, the district court directed the parties to submit a statement of issues to be resolved in that motion. On April 29, 1983, National filed its statement which included the question of whether the transaction involved a breach by the ISU of its duty of fair representation. Thereafter,

on May 26, 1983, after receiving National's motion papers which fully briefed that issue, petitioners filed their statement of issues to be resolved which also included their unfair representation claims. *Brunner* Appendix at A6-A9; A45.

2. ***The Decisions Below***

In a Memorandum Opinion and Order entered July 8, 1983 (the "July 8 Order"), the district court granted partial summary judgment in favor of National and its Retirement Program in the *Sutton* and *Brunner* actions. The court also resolved in favor of National, the Committee and the ISU the issues deferred in the motions to dismiss filed by the Committee and the ISU. *Brunner* Appendix at A1-A35, *Sutton* Appendix at 17a-50a. In a companion order, entered September 12, 1983, the court granted partial summary judgment in favor of National and its Retirement Program in *Dhayer* and dismissed all claims against the ISU in that action. *Sutton* Appendix at 53a-83a.

The district court held that the sale of the Division's assets to Weirton Steel, and in particular the amendments to the pension and severance benefit plans, did not violate sections 404 or 406 of ERISA. 29 U.S.C. §§ 1104, 1106 (1982). The court found that the fiduciary duties owed plan beneficiaries under section 404 did not prohibit the modification or deletion of contingent, nonvested benefits. *Brunner* Appendix at A18-A20. The court also held that the fiduciary duties imposed under ERISA did not preclude an employer from exercising its rights to negotiate or determine the terms and conditions of future pension benefits simply because it happens also to be a plan administrator. *Brunner* Appendix at A26-A30. Similarly, the court held that section 406 of ERISA was not applicable to a sale of corporate assets which neither requires the plan to participate in any transaction, nor involves the use of the monies, properties or other like assets of the plan. *Brunner* Appendix at A23-A26.

With respect to petitioners' claims that the ISU breached its duty of fair representation by "acquiescing in the withdrawal

of member's negotiated pension and severance rights," the court reaffirmed the principle, long established by this Court, that in the context of a threat to its members' jobs, a union is possessed of great leeway "to pursue unique procedures and mechanisms to avoid loss of employment for [its] members," which includes the right to negotiate amendments to existing collective bargaining agreements, provided that the union acts in good faith and in a nondiscriminatory manner. *Brunner* Appendix at A10-A12.

With this principle in mind, the court found that the undisputed facts conclusively established: (a) that the proposed amendments to the collective bargaining agreements applied uniformly to all ISU members, and, hence, were nondiscriminatory; (b) that the framework for the sale of the Division's assets, including the proposed amendments to the pension and severance plans, was negotiated principally by independent, outside consultants having national and international reputations in their areas of expertise, whose recommendations were considered and relied upon by the ISU; and (c) that petitioners had made no specific allegation and raised no question of fact supporting their argument that the amendments were arbitrary. Under these circumstances, the court concluded that the ISU had not breached its duty of fair representation. *Brunner* Appendix at A12-A13.

Final judgments pursuant to Rule 54(b) of the Federal Rules of Civil Procedure were entered in *Sutton* and *Brunner* on September 15, 1983, and in *Dhayer* on September 21, 1983. *Sutton* Appendix at 86a-90a. Plaintiffs in all three actions appealed, and those appeals were consolidated for disposition with appeals filed earlier challenging the denial of preliminary injunctive relief in *Brunner* and *Sutton*, and the denial by the district court of class certification in the *Brunner* action.

The Court of Appeals for the Fourth Circuit affirmed the district court's opinion, finding: that "all of the material facts, save one, were established by uncontradicted evidence," and that as to that one issue—National's motivation in agreeing to sell the Division to Weirton Steel—the district court had

treated, and the Court of Appeals would treat, the fact as proved as petitioners had alleged, *Brunner* Appendix at A40; and that an employer who is also a plan fiduciary is not precluded from "exercising the right accorded other employers to renegotiate or amend, as the case may be, unfunded contingent benefits payable before normal retirement age." *Brunner* Appendix at A40-A42. The court further held that a contingent liability which was not required by ERISA to be funded did not constitute an "asset" of a plan for purposes of the "prohibited transaction" provisions of section 406 of ERISA and that National had not "caused the plan to engage in a transaction" by virtue of the segregation of plan assets into a separate trust for the benefit of Weirton Steel employees or retirees. *Brunner* Appendix at A42-A44. Finally, with respect to the unfair representation claim, the court affirmed the district court on the law and the facts and held that, in view of the procedural history of the actions, any irregularity which may have existed in the grant of summary judgment was harmless error. *Brunner* Appendix at A44-45.

REASONS FOR DENYING THE WRIT

I.

THE RULING BY THE COURT BELOW THAT THE TERMS OF THE SALE OF THE DIVISION'S ASSETS TO WEIRTON STEEL DID NOT VIOLATE ERISA PRESENTS NO ISSUE WARRANTING REVIEW BY THIS COURT.

With respect to the ruling by the court below on petitioners' ERISA claims, petitioners offer essentially three purported justifications for granting of a writ of certiorari: (1) the court below decided questions of first impression which warrant review and further guidance by this Court, *Brunner* Petition at 9-11; (2) the decision by the court below will have far reaching impact on other benefit plans and plant closings, *Brunner* Petition at 10; and (3) the decision by the court below is erroneous, *Brunner* Petition at 11-20, *Sutton* Petition at 13-23.

Contrary to petitioners' assertions, the decision below properly applied established principles of law to a specific

factual setting and rejected a legal position which was unsupported, conflicted with both the language and intent of ERISA and which was patently unreasonable. The decision introduced no "new" interpretation of ERISA and thus is likely to have little, if any, impact on the administration of benefit plans governed by ERISA or on the integrity of benefit plans generally. Finally, the decision below arises in a unique factual setting which limits the precedential impact of the decision in areas where potential abuses may arise. Under these circumstances, review by this Court is unwarranted.

A. The Decision By The Court Below That The Negotiated Terms Of A Sale Of Corporate Assets To An Employee-Owned Enterprise Are Not To Be Governed By The Fiduciary Standards Of ERISA Involved The Application Of Established Legal Principles And Requires No Review By This Court.

The sole issue under section 404 of ERISA presented by petitioners is whether the court below erred in finding that amendments to employee benefit plans obtained by the employer through arms-length negotiations with representatives of its union and nonunion employees regarding the sale of corporate assets as an ongoing business to its employees are not to be measured against the fiduciary standards of section 404(a) of ERISA. 29 U.S.C. § 1104(a) (1982).

This issue was clearly resolved by this Court in *United Mine Workers Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982), which held that changes in pension benefits negotiated in the context of collective bargaining are not subject to scrutiny under the fiduciary standards imposed under section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c)(5) (1982). That provision is, for practical purposes, identical to section 404(a)(1) of ERISA. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 332 (1981) (ERISA essentially codified the strict fiduciary standards that a section 302(c)(5) trustee must meet).

As petitioners urge here, the Court of Appeals held in *Robinson* that changes made in the eligibility rules for a benefit

trust which had been negotiated between the employer and the union were to be reviewed under the standards applicable to the review of actions of trustees in administering the fund, *i.e.*, the arbitrary and capricious standard. This Court reversed, holding that fiduciary standards were inapplicable to changes implemented as a result of collective bargaining when the plan itself allows the changes and no separate trust instrument prohibits the changes from being implemented.

As stated by this Court in *Robinson:*

> But when neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining contract.

455 U.S. at 576 (footnote omitted). The Courts of Appeals, following *Robinson,* have consistently adhered to this principle. *See Short v. United Mine Workers 1950 Pension Trust,* No. 83-1220 (D.C. Cir. Feb. 28, 1984), *reprinted in,* 100 Lab. Cas. (CCH) ¶ 10,844; *Sinai Hospital v. National Benefit Fund,* 697 F.2d 562 (4th Cir. 1982).

The rationale underlying these decisions is that when an employer is engaged in negotiations concerning the scope of a benefit plan, it is not engaged in discharging "duties with respect to a plan," but is acting as an employer whose business activities and objectives are not subject to ERISA's fiduciary standards. Although this dichotomy between action undertaken as an administrator and as an employer is perhaps most evident in the context of collective bargaining, it is no less applicable when an employer undertakes consideration of plan amendments affecting nonunion employees.

The employer continues to have the right to amend a benefit plan so as to limit nonvested contingent benefits, and such amendments no more merit the invocation of the fiduciary standards of ERISA than they do when they are negotiated in the course of collective bargaining. This is particularly true when, as in this case, the amendments arise out of direct arms-length negotiations with representatives of the nonunion em-

ployees which were coterminous with negotiations between the employer and the collective bargaining representative of the union employees. In short, whether an employer is an administrator of a plan covering union-represented employees or non-represented employees, it retains the right as an employer to determine the nature and amount of future benefits available under a plan, including amending the plan to limit or delete existing contingent and nonvested benefits.

NLRB v. Amax Coal Co., 453 U.S. 322 (1981), upon which petitioners principally rely, also illustrates the dichotomy between an employer acting as an "employer" and an employer "discharging duties with respect to a plan." In that case, this Court unequivocally distinguished between the "administration of trust funds" to which the fiduciary obligations of ERISA apply and the collective bargaining process, stating:

> The management-appointed and union-appointed trustees do not bargain with each other to set the terms of the employer-employee contract; they can neither require employer contributions not required by the original collectively bargained contract, nor compromise the claims of the union or the employer with regard to the latter's contributions. Rather, the trustees operate under a detailed written agreement, which is itself the product of bargaining between the representatives of the employees and those of the employer. Indeed, the trustees have an obligation to *enforce* the terms of the collective-bargaining agreement regarding employee fund contributions against the employer "for the sole benefit of the beneficiaries of the fund."

Id. at 336-37 (citations omitted) (emphasis in original).

Under settled precedent of this Court, therefore, an employer is not engaged in discharging duties with respect to a benefit plan when negotiating the terms of collective bargaining agreements, including modifications to the documents which brought the plan into existence. For this reason, the fiduciary obligations of section 404(a) do not apply to prevent an

employer from seeking concessions from its employees in the form of amendments to existing benefit plans which affect contingent and nonvested benefits.

The decision by the court below merely applied these settled principles to an analogous factual setting involving arms-length negotiations, both within and without the collective bargaining context, between an employer and its employees regarding the sale to the employees of corporate assets as an ongoing business. No novel question regarding the application of ERISA's fiduciary standards is before this Court, and the decision of the court below granting summary judgment in favor of respondents on petitioners' section 404(a)(1) claims does not warrant review by this Court.

B. The Decision By The Court Below That No Prohibited Transaction Was Involved In The Sale Of The Division's Assets Merely Rejected An Unprecedented And Tortured Interpretation Of Section 406 Of ERISA And Does Not Merit Review By This Court.

Petitioners' claims under section 406 of ERISA, 29 U.S.C. § 1106 (1982), likewise, present no issue worthy of review by this Court. Petitioners urged both courts below to place a strained judicial gloss upon the term "assets of the plan" in section 406, bringing within that section transactions which in no manner involve the use of monies or other property of the plan held for the purpose of providing benefits to plan participants. Petitioners failed to advance a single decision which even remotely supports such a gloss, or to explain how such a construction could be justified by the language or legislative history of the act.

The district court refused to give the term "asset" a meaning other than that given to it in the business community, *i.e.*, monies, property or other like assets. *Brunner* Appendix at A25-A26. The Court of Appeals affirmed, noting the incongruity between a rule, such as that urged by petitioners, which would render speculative contingent liabilities an "asset of the plan" and the fact that ERISA does not require such

contingent liabilities to be funded as assets of the plan. *Brunner* Appendix at A42-A43. The Court also noted that because no monies, property or other like assets were involved in the "elimination" of the contingent benefits at issue, no funds held by the plan for the purpose of paying benefits to participants were depleted or recouped by National as a result of the amendments to the terms of the plan. *Brunner* Appendix at A42.

This Court has long held that in interpreting statutory language, such language is to be given its usual or customary meaning absent compelling evidence that a different meaning was intended. *Aaron v. SEC,* 446 U.S. 680, 699-700 (1980); *Burns v. Alcala,* 420 U.S. 575, 580-81 (1975); *Banks v. Chicago Grain Trimmers Association,* 390 U.S. 459, 465 (1968); *Malat v. Riddell,* 383 U.S. 569, 571-72 (1966). Petitioners failed to produce such evidence either before the courts below or in their petitions to this Court. Furthermore, although Congress never explicitly defined the term "assets" in section 406, both the language and history of ERISA compel the conclusion that Congress intended the term to apply only to the monies and properties held by the plan for the payment of benefits.

As a threshold matter, the term "asset" in section 406 must be viewed in the light of the other terms within that section. *E.g., Third National Bank v. IMPAC Ltd.,* 432 U.S. 312, 322-23 (1977); *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307 (1961) (the maxim *noscitur a socii,* that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid giving unintended breadth to Acts of Congress). Section 406 deals quite plainly with the "sale or exchange, or leasing, of any property," the "lending of money" or the furnishing of "goods, services, or facilities" of a plan. 29 U.S.C. § 1106(a)(1) (1982). The use of these terms belies petitioners' contention that section 406 was intended to prohibit transactions other than those involving directly or indirectly the monies or property held in trust by the plan.

Petitioners' contention is refuted, as well, by the legislative history of ERISA. The House Conference Report accompanying ERISA states that one of the fundamental purposes of ERISA was to "establish new minimum funding requirements for plans of employers and unions ... so these plans will accumulate sufficient assets within a reasonable time to pay benefits to covered employees when they retire." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., *reprinted in,* 1974 U.S. Code Cong. & Ad. News 5038, 5064 (hereinafter cited as "Conference Report"). *Accord* H.R. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in,* 1974 U.S. Code Cong. & Ad. News 4639, 4645 ("Funding" refers to the accumulation of sufficient assets in a pension plan to assure the availability of funds for payment of benefits due to the employees as such obligations arise)(hereinafter cited as "House Report"); S. Rep. No. 93-127, 93d Cong., 2d Sess., *reprinted in,* 1974 U.S. Code Cong. & Ad. News 4838, 4845-46 (hereinafter cited as "Senate Report"). Moreover, Congress expressly excluded from the fiduciary standards imposed by sections 404 and 406 various types of plans that are not required to be funded. Conference Report, *supra,* at 5076-77. Finally, the Conference Report clearly links the concept of "plan assets" to an employer's contributions when it states:

> Since the assets of the employee benefit plan are to be held for the exclusive benefit of participants and beneficiaries, plan assets generally are not to inure to the benefit of the employer. However, the conference substitute allows an employer's contributions to be returned to him in certain limited situations.

Id. at 5083.

The *Brunner* petitioners have quoted out of context a portion of the Conference Report to suggest that Congress intended section 406 to include transactions having nothing to do with the monies or properties of a plan. But, in context, even that portion of the Conference Report supports the view, adopted by the court below, that a prohibited transaction must,

as a threshold matter, involve the direct or indirect use of the monies or properties of a plan. That portion reads:

> The substitute prohibits the direct or indirect transfer of *any plan income or assets to or for the benefit of a party-in-interest.* It also prohibits the use of plan income or assets by or for the benefit of any party-in-interest. As in other situations, this prohibited transaction may occur even though there has not been a transfer of money or property between the plan and a party-in-interest. *For example, securities purchases or sales by a plan to manipulate the price of the security to the advantage of a party-in-interest constitutes a use* by or for the benefit of a party-in-interest *of any assets of the plan.*

Id. at 5089 *(emphasis added)*.

In view of the language of the statute and the foregoing statements of congressional intent, the rules of statutory construction established in cases such as *Aaron* and *Third National Bank* pose a nearly insurmountable obstacle to petitioners' argument that Congress intended the word "asset" to encompass anything other than monies, property or like assets. Those rules certainly required petitioners to come forward with more definitive evidence of *congressional* intent than vague statements of policy taken out of context and having no relevance to the definition of the term. *See Aaron v. SEC,* 446 U.S. at 700 n.19 (when language and legislative history provide adequate evidence of the meaning of a term, resort to considerations of "policy" is inappropriate when construing a statute). *Accord Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 214 n.33 (1976). Petitioners, however, failed to come forward with such evidence, thereby raising before this Court only a routine question of statutory construction utilizing standards established by this Court.

Furthermore, the question presented for review is not crucial to the administration of benefit plans under ERISA. Plans have been consistently administered under the assumption, endorsed by the courts below, that the term "assets of a

plan" is to be given its customary meaning, *i.e.*, monies, property or like assets. Indeed, FASB accounting practices provide that:

> Plan assets generally include cash, contributions receivable, investments measured at fair value, contracts with insurance companies (excluding those which obligate the insurance company to pay pension benefits) measured at contract value, and operating assets (such as buildings and equipment) measured at historical cost less accumulated depreciation.

FASB Statement No. 35 "Accounting and Reporting By Defined Benefit Pension Plans" 3 (1980) (hereinafter "Statement 35").

The Kass Affidavit[6] provides no support for petitioners' position. The court below held that, even if the Kass Affidavit were viewed as authoritative, there is a difference between defining the term "asset" for purposes of determining an employer's "pension expense," as did the Kass Affidavit, and defining the term "asset" for purposes of ERISA. The standards for determining pension expense are not controlling when determining a plan's "assets." *Brunner* Appendix at A42-A43. Statement 35 expressly endorses this position. Statement 35 at 2.

Petitioners have made no showing that plan trustees or administrators have departed from FASB standards in administering plans subject to ERISA. There is, therefore, simply no basis for assuming that the decision by the court below will alter significantly the manner in which ERISA has been interpreted or applied since its enactment nearly ten years ago. Under these circumstances, review of petitioners' claims under section 406 of ERISA by this Court is unwarranted.

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[6] The *Sutton* petitioners erroneously assert in their petition that Kass was a member of the actuarial firm retained by the Committee to analyze the various pension ramifications of the sale. *Sutton* Petition at 8. As stated in the Kass affidavit, Kass has been a member of the firm of Kass, Germain & Company since 1971. *Sutton* Appendix at 121a.

C. The Decision Of The Court Below Arises In A Unique Factual Context And Is Not Likely To Have Widespread Implications For The Administration of Benefit Plans.

Review of the decision below by this Court is unwarranted for still another reason: the unique factual setting of this case. Petitioners' protestations notwithstanding, the facts which both courts below found to be conclusively established are that National made a *bona fide* economic decision to down-size the Division, and that the union—not the employer—initiated steps, including the formation of the Committee, to explore the possibility of an employee purchase of the Division in an effort to save its members' jobs. Every effort was taken to assure that the most equitable terms possible were obtained, including making provision for representation of nonunion employees on the Committee and retaining independent, outside experts of national and international repute to negotiate a framework for the sale and make recommendations to the ISU.

The negotiations culminated in a sale of assets as an ongoing business to an employee-owned corporation without a plant closure or even a pause in its activities. The terms of the sale were submitted to the union membership, including those members on layoff status, for ratification after full disclosure and were overwhelmingly approved. Under those terms, Weirton Steel employees were entitled to receive the identical benefits to which they were entitled as National employees, including shutdown benefits in the event Weirton Steel were to close.

Given these facts, it is respectfully submitted that this case is not appropriate for evaluating the proper relationship between the collective bargaining process and ERISA's fiduciary standards. This case does not present an occasion for this Court to reconsider its prior decisions in *Robinson* and *Amax Coal Co.*, nor does this case involve a deprivation of benefits without representation such as concerned the district court in *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979), *opinion after trial sub nom., Dependahl v. Falstaff Brewing*

Corp., 491 F. Supp. 1188 (E.D. Mo. 1980), *modified on other grounds*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981), a case which was decided before this Court's decision in *Robinson*. In addition, there is no suggestion that the opinion of the court below would necessarily extend beyond this case or outside the context of arms-length negotiations between an employer and representatives of both union and nonunion employees. This case, therefore, lacks an appropriate factual setting for the Court to reconsider earlier holdings or provide adequate guidance for future cases.

In summary, the decision by the court below that the sale of the Division's assets by National to its employees did not violate ERISA involved issues previously resolved by this Court and routine interpretation of statutory language, the meaning of which is clear on its face and from its legislative history. The resolution of those issues adopted by the court below, moreover, will not alter significantly the manner in which benefit plans are formulated or administered. Finally, this case presents a unique factual setting which renders it inappropriate as a vehicle to reconsider earlier decisions by this Court or to provide adequate guidance for use in other cases. For these reasons, as well as the fundamental soundness of the decision, the decision below respecting petitioners' ERISA claims does not warrant review by this Court.

II.

THE FINDINGS BY THE COURT BELOW THAT THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT TO THE ISU ON PETITIONERS' UNFAIR REPRESENTATION CLAIMS WAS HARMLESS ERROR SHOULD NOT BE REVIEWED BY THIS COURT.

With respect to the ISU, petitioners claimed below that the union breached its duty of fair representation to its members by "acquiescing" in the terms of the sale of the Division's assets when those terms would allegedly deprive ISU members of

certain pension and severance benefits. Both courts below found that the uncontroverted evidence failed to raise an issue of fact as to any impropriety on the part of the ISU. Specifically, the courts below found that: (1) the facts conclusively demonstrated that the terms of sale were not discriminatory, inasmuch as they uniformly applied to every member of the ISU; (2) that the transaction was largely formulated and recommended by independent, outside consultants having national and international reputations for excellence in their areas of expertise, whose recommendations were considered and adopted by the ISU; and (3) that petitioners had failed to offer any specific allegations or facts which would suggest that the ISU's actions with respect to the sale were arbitrary or in bad faith, despite having cross-examined at length the president of the ISU at a full evidentiary hearing.

Petitioners did not challenge these findings before the Court of Appeals, nor do they challenge them in their petition to this Court. Rather, as they did below, petitioners ask this Court to review alleged procedural irregularities in the granting of summary judgment in favor of the ISU. Petitioners' primary contention below, and in their petitions, is that they were denied notice and an opportunity to defend because the ISU did not make a formal motion for summary judgment.

The Court of Appeals, however, found that in view of the procedural history of this case any error committed was harmless. That history is recounted in detail earlier in this brief. In essence, summary judgment was granted to the ISU after petitioners presented live testimony from their own witnesses and cross-examined respondents' witnesses at length regarding all issues relevant to the unfair representation claims at a full evidentiary hearing on their motions for preliminary injunctions. Moreover, when the district court considered the motion to dismiss filed by the Committee and ISU, it deferred consideration of the unfair representation issues pending consideration of National's motion for summary judgment. Both National and petitioners filed statements of issues to be resolved on the summary judgment motion which included the

unfair representation claims. Thus, petitioners had both actual and constructive notice that the district court would resolve the unfair representation claims along with National's motion for summary judgment, in effect treating the deferred issues in the motion to dismiss as a motion for summary judgment.

Neither the court below, nor this Court, will reverse an otherwise valid decision on the grounds of procedural error when that error results in no prejudice to the party seeking reversal. *See* 28 U.S.C. § 2111 (1982); Fed. R. Civ. P. 61. It is evident from the history of this litigation that the substantive rights of petitioners herein were in no manner prejudiced by the district court's grant of summary judgment in favor of the ISU. Review of petitioners' unfair representation claims by this Court is therefore unwarranted.

III.

THE DECISION BELOW DISMISSING PETITIONERS' STATE LAW CLAIMS IS NEITHER SUBJECT TO, NOR MERITS, REVIEW BY THIS COURT.

The *Sutton* and *Dhayer* petitioners, on the last two pages of their petition, appear to challenge the decision of the district court not to exercise pendent jurisdiction over their state law claims. *Sutton* Petition at 24-25. The district court had declined to exercise pendent jurisdiction on the grounds that its pretrial dismissal of the federal law claims upon which pendent jurisdiction was allegedly predicated rendered the exercise of such jurisdiction inappropriate and not in the interest of judicial economy. *Sutton* Appendix at 79a-81a. That decision has not been properly brought before this Court, and, in any event, does not merit review by this Court.

A. No Question Has Been Properly Presented To This Court For Resolution.

Rule 21.1(a) of the rules of practice of this Court provides that every petition for certiorari must contain a statement of the questions presented for review. Rule 21.1(a) then provides

that "only questions set forth in the petition or fairly included therein will be considered by the Court."

The *Sutton* petition presents only a single question for review: whether the court below properly granted summary judgment on petitioners' ERISA claims. *Sutton* Petition at i. The denial of pendent jurisdiction is nowhere set forth as a question for review nor is it fairly included therein.

Moreover, even if the briefing of an issue were deemed to comply with Rule 21.1, the *Sutton* petitioners have not raised any question for resolution by this Court. At best, petitioners merely set forth a basis upon which the district court could have exercised pendent jurisdiction at the outset of this litigation; they in no manner pose a concrete issue to be resolved by this Court. It is respectfully submitted, therefore, that no question regarding petitioners' pendent jurisdiction claims has been properly presented to this Court and, accordingly, the *Sutton* petition should not be granted.

B. The Decision By The District Court To Decline To Exercise Pendent Jurisdiction Presents No Issue Worthy of Review.

Petitioners apparently assert that the decision by the district court to decline to exercise pendent jurisdiction denied them "substantial procedural due process." *Sutton* Petition at 25. Such a patently frivolous position hardly merits consideration by this Court.

This Court has long held that the exercise of pendent jurisdiction is vested within the sound discretion of the court, which discretion should be exercised sparingly in the interests of judicial economy and with due consideration of the facts and circumstances of each case. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Pendent jurisdiction is not a procedural right of petitioners, constitutional or otherwise.

Moreover, this Court ordinarily does not sit in review of fact-bound discretionary decisions of lower courts, especially when, as here, the legal standard is not in dispute. *E.g., Graver*

Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949); *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). Petitioners have offered no basis for the Court to depart from that practice in this case. Indeed, neither before the court below, nor in their petition to this Court, have the *Sutton* petitioners advanced a single basis for finding that the district court abused its discretion. In view of the pretrial dismissal of petitioners' federal law claims, it is difficult to discern how such an argument could be made. Therefore, even if a question were properly before this Court, review would not be warranted.

CONCLUSION

For all of the foregoing reasons, the Petitions for Writs of Certiorari in the *Brunner, Sutton* and *Dhayer* actions should be denied in their entirety.

Respectfully submitted,

ANTHONY F. PHILLIPS
(Counsel of Record)
WILLKIE FARR & GALLAGHER
153 East 53rd Street
New York, New York 10022
(212) 935-8000

BOGARAD & ROBERTSON
3147 West Street
Weirton, West Virginia 26062
(304) 748-0828

Attorneys for Respondents
Weirton Joint Study
Committee, Inc. and
Independent Steelworkers Union

Of Counsel:

GERALD KERNER
BRIAN E. O'CONNOR
LAURENCE H. LENZ, JR.
DAVID L. ROBERTSON

No. 83-1576 and No. 83-1584

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In the Supreme Court of the United States

October Term, 1983

EUGENE R. SUTTON, *et al.*,
Petitioners,

v.

WEIRTON STEEL DIVISION OF
NATIONAL STEEL CORPORATION, *et al.*,
Respondents.

EDWARD DHAYER, *et al.*,
Petitioners,

v.

WEIRTON STEEL DIVISION OF
NATIONAL STEEL CORPORATION, *et al.*,
Respondents.

GERALD W. BRUNNER, *et al.*,
Petitioners,

v.

NATIONAL STEEL CORPORATION, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Brief In Opposition To Petitions For Writs Of Certiorari

CARL H. HELLERSTEDT, JR.
(Counsel of Record)
JOSEPH MACK, III
BRIAN J. DOUGHERTY
THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, Pennsylvania 15222
(412) 394-7767

Attorneys for Respondents
National Steel Corporation and
National Steel Corporation
Retirement Program

COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Are the fiduciary standards of the Employee Retirement Income Security Act of 1974 (ERISA), Section 404(a)(1), 29 U.S.C. §1104(a)(1), applicable for reviewing the actions of an employer which, in negotiating with representatives of employees purchasing a plant as an ongoing operation, obtains agreement from union-represented employees by their vote and from non-union employees by agreement with their representatives, to adopt amendments to existing pension plans, severance policies, pension agreements and collective bargaining agreements, for the purpose of clarifying such plans, policies and agreements to reflect the parties' understanding that the sale would not be interpreted as triggering any employee's eligibility for special pension and severance benefits which are contingent upon loss of employment resulting from a permanent shutdown of the plant and are not vested, accrued, or non-forfeitable under the terms ERISA or plan documents?

2. Does an employer engage in a prohibited transaction within the meaning of Section 406(a) and (b) of ERISA, 29 U.S.C. §1106(a) and (b), when, in negotiating with representatives of employees purchasing a plant as an ongoing operation, the employer obtains agreement from union-represented employees by their vote and from non-union employees by agreement with their representatives, to adopt amendments to existing pension plans, severance policies, pension agreements and collective bargaining agreements, for the purpose of clarifying such plans, policies and agreements to reflect the understanding of the parties that the sale of the plant to such employees would not be interpreted as triggering any employee's eligibility for special pension and severance benefits which are con-

tingent upon loss of employment resulting from permanent shutdown of the plant and are not vested, accrued or non-forfeitable under the terms of ERISA or plan documents?

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No. 83-1576 and No. 83-1584

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ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**Brief In Opposition To Petitions
For Writs Of Certiorari**

Respondents National Steel Corporation and the National Steel Corporation Retirement Program submit this brief in opposition to the Petitions for Writs of Certiorari filed by the appellants in the actions captioned *Sutton, et al. v. Weirton Steel Division of National Steel Corporation, et al.* and *Dhayer, et al. v. Weirton Steel Division of National Steel Corporation, et al.* in No. 83-1576 and *Brunner, et al. v. National Steel Corporation, et al.* in No. 83-1584.[1]

COUNTERSTATEMENT OF THE CASE

These cases arise out of the agreement of National Steel Corporation to sell substantially all of the assets of its Weirton Steel Division (hereinafter the "Division") as an ongoing steelmaking operation to a newly formed company known as the Weirton Steel Corporation. The stockholders of the Weirton Steel Corporation are its employees, who acquired ownership of the stock through an Employee Stock Ownership Plan (ESOP). The closing of the sale occurred January 11, 1984. The assets of the Division are now owned and operated by the Weirton Steel Corporation.

The Petitioners in *Sutton* and *Brunner* were employees of the Division who are represented for purposes of collective bargaining by either the Independent Steelworkers Union or the Independent Guard Union (hereinafter referred to jointly as the "Union"). The Petitioners in *Dhayer* were employees of the Division who were not members of, or represented by, any labor organization.

Prior to the sale of the Division, Division employees participated in a pension plan which covered union and

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[1]The appellants in the *Brunner, Sutton* and *Dhayer* actions are collectively referred to herein as "Petitioners."

entitlement to receive 70/80 or Rule-of-65 pension benefits or severance payments. Pursuant to its agreement with the Committee as to non-union employees, National also adopted identical clarifying amendments to its salaried pension plan and severance policy.

The buyer, Weirton Steel Corporation, after negotiation with the Union, instituted a pension plan which included 70/80 and Rule-of-65 pension provisions, which provisions are the same as those which were contained in the National plan prior to the clarifying amendments. In addition, the same severance pay provisions as had existed with National prior to those amendments were included in Weirton Steel Corporation's new collective bargaining agreements with the Union. Non-union employees of Weirton Steel Corporation were made participants in the same pension plan as Union employees and were granted a severance policy identical to that which they had enjoyed with National.

The practical effect of these agreements, therefore, was that Weirton Steel Corporation undertook the obligation to pay 70/80 and Rule-of-65 retirement benefits and severance payments after the sale on the same basis as National had offered them prior to the sale. Moreover, National's obligation to pay 70/80 and Rule-of-65 pension benefits did not terminate with the sale. As already noted, in the event of a permanent shutdown of the entire plant within five years, National and its pension fund which is applicable to its former Weirton employees and retirees are obligated to pay the 70/80 and Rule-of-65 retirement benefits based upon a proration of service with National and with Weirton Steel Corporation. Thus, the pension and severance benefit provisions at issue remain in existence after the sale. No one has lost such benefits by virtue of the sale.

Petitioners nevertheless argue that the sale should have entitled them to immediate payment of such benefits by National. They want National to pay these benefits although they never lost a single day's work by virtue of the transfer of ownership, and although they continue to work for an acquiring corporation which has established identical benefit provisions.

The Petitioners claimed that, but for the above described clarifying amendments, a sale of the assets, regardless of continued employment with Weirton Steel Corporation, would have been a permanent shutdown of the plant and consequent loss of their employment. They further claimed that the sole motivation of National in selling the plant, under the terms of its agreement with the Committee, was to avoid future pension obligations represented by the 70/80 and Rule-of-65 contingent pension benefits which National would have incurred if it had continued to own the plant and had implemented its announced intention to reduce operations. They argued that, assuming such motivations, National violated its fiduciary duty as administrator of the pension plan by negotiating a sale under the terms described above. They argued further that National's actions violated ERISA provisions prohibiting certain transactions involving the assets of the plan.

The court of appeals assumed, for purposes of reviewing the grant of summary judgment by the district court, that the sole motivation of National in selling the plant was to avoid future pension obligations in the form of 70/80 and Rule-of-65 contingent pension benefits. Agreeing with the result reached by the district court, the court of appeals held that, even assuming such motivations, since the challenged amendments affected only contingent, forfeitable benefits, National's actions were not subject to

ERISA's fiduciary duty to act solely in the interests of plan participants.

As to the claim that the sale constituted a prohibited transaction under ERISA because plan "assets" were negotiated away in conjunction with the sale, the court of appeals rejected Petitioners' argument that a contingent liability for ancillary pension benefits is an asset of the plan within the meaning of §406 of ERISA, 29 U.S.C. §1106.

REASONS FOR DENIAL OF THE WRIT

A. THE WRIT SHOULD BE DENIED BECAUSE PETITIONERS' ARGUMENTS ARE BASED UPON FACTUAL ASSERTIONS CONTRARY TO THE FACTS FOUND BY THE LOWER COURTS.

The writ should be denied because Petitioners premise their arguments on factual assertions which are (a) contrary to the facts found by the district court on the basis of extensive testimony and evidence presented at the preliminary injunction hearings and (b) contrary to facts found by the court of appeals to have been unrefuted in proceedings before the district court. Specifically, the writ should be denied because Petitioners continue to rely herein, as they did before the courts below, upon the assertion that the Weirton Joint Study Committee, Inc., did not operate independently of National Steel Corporation in negotiations regarding the terms of the sale of the Division.

Petitioners in *Brunner* make this assertion obliquely in their argument that the lower court's finding that the Union did not breach its duty of fair representation is erroneous. They assert that the Union breached its duty of fair representation by allowing the Committee, which included five management members and twenty-four

Union members, to negotiate terms of sale with National. Based upon the testimony and evidence submitted at the preliminary injunction hearings, the district court held that the Union's role in the sale did not constitute a breach of its duty. The court of appeals likewise held that the evidence conclusively established the legality of the Union's actions. In addition, the General Counsel of the National Labor Relations Board refused to issue unfair labor practice complaints against either National or the Union based on Petitioners' contentions about the operation of the Committee. *See* Appendix A of this Brief.

The Petitioners in *Sutton* and *Dhayer* assert National negotiated "with itself," again basing this assertion on their characterization of the Committee's role in the sale process. Like that of the *Brunner* Petitioners, this argument is an attack on the district court's factual findings, which were based upon the testimony and exhibits Petitioners themselves generated at the preliminary injunction hearings. This argument is likewise contrary to the determinations made by the General Counsel of the NLRB in support of his decision not to issue a complaint based upon the same allegations.

Petitioners press these previously rejected assertions here in an attempt to avoid the consequences of this Court's holding in *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982), where this Court held unequivocally that "when neither the collective bargaining process nor its end product violates any command of Congress," 455 U.S. at 576, the actions of an employer negotiating changes in retirement benefits are not subject to scrutiny under ERISA's fiduciary standards. *See* Section B, *infra*. However, the Petitions show nothing which would warrant this Court's review of the findings the district court made and

the court of appeals affirmed as to the operation of the Committee. Consequently, certiorari should be denied.

B. THE COURT OF APPEALS CORRECTLY RELIED UPON *UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS V. ROBINSON.*

The decision of this court in *United Mine Workers of America Health and Retirement Funds v. Robinson, supra,* is controlling as to the ERISA issues presented for review. *Robinson* holds that negotiated changes in benefit plans are not to be reviewed under the fiduciary standards that would be applicable to review of actions of trustees in administering a fund: so long as the employer's actions in seeking and adopting changes in such plans do not violate either the terms of the plan or the terms of a separate trust instrument, and so long as the end product does not violate ERISA, courts should not interfere with an employer's right to adjust the level of benefits or the eligibility requirements for those beneifts.

Petitioners have attempted to distinguish *Robinson* both by attacking the negotiating process which resulted in the clarifying amendments and by focusing on what they characterize as the "unique circumstances" of those negotiations. Petitioners in *Dhayer* argue further that they are not members of any bargaining unit represented by the Union and, therefore, the Union (or the Committee) was not obliged to protect their interests during the negotiations culminating in the sale. However, these attempts to distinguish *Robinson* are unavailing in raising any questions worthy of review by this Court.

We have already noted that Petitioners' allegations as to the process of negotiation leading up to the terms of sale have been thoroughly explored and resolved adversely to

Petitioners by both courts below, as well as by the General Counsel of the NLRB. Certiorari is not warranted in order merely to review these determinations.

Moreover, an analysis of the salient facts and issues involved in *Robinson* indicates that the remaining "distinctions" drawn by Petitioners here do not take the present case outside of *Robinson's* rationale and holding. More specifically, Petitioners' allegations that National "coerced" Weirton employees at the eleventh hour and that the Committee could not fairly represent salaried employees such as the *Dhayer* Petitioners because neither the Committee nor the Union owed any particular legal duty to them are directly analagous to certain arguments in *Robinson* which this Court mentioned but found not to affect the holding.

The *Dhayer* Petitioners, for example, are no different from the plaintiffs in *Robinson*, insofar as both groups were represented in negotiations by parties which had no legal duty or obligation to do so. That is, the plaintiffs in *Robinson* were not members of a bargaining unit represented by the UMW; they were, rather, widows of coal miners. The union owed them no duty of fair representation. Yet this Court found nothing impermissible in the consequences of the union's actions affecting these plaintiffs under the collective bargaining agreement negotiated between the employers and the UMW. 455 U.S. at 574-575, citing *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n. 20 (1971).

In the present cases, it must be assumed either that the *Dhayer* Petitioners were represented on the Committee by members of Division management or that they were represented by the Union itself, insofar as National's negotiations with the Union "set the pattern" for clarifying

non-union Division employees, as well as other groups of employees within National. In addition, National provided Division employees with certain severance benefits pursuant to either corporate policy or collective bargaining agreements. The pension plan gave National authority to appoint a board of administration to administer the plan. It has not been disputed that this authority renders National a fiduciary under ERISA with respect to the pension plan.

The Petitioners challenge certain terms of the negotiated agreements leading to the sale of the plant. Those agreements required the amendment of pension plans and severance policies to state that the sale of assets would not be interpreted to constitute a permanent shutdown of the plant resulting in loss of employment so as to trigger eligibility for contingent pension benefits (referred to as "70/80" and "Rule-of-65" pensions) and severance pay.[2] Petitioners argue that by negotiating such clarifying amendments, National Steel Corporation violated its fiduciary duties under ERISA and engaged in a transaction prohibited by ERISA.

Shortly after filing their complaints, Petitioners in *Sutton* and *Brunner* moved for temporary restraining orders and, later, for preliminary injunctions to enjoin the sale of Division assets. The district court conducted three days of hearings on Petitioners' Motions for Preliminary Injunctions. Witnesses who testified included Walter Bish, President of the Union and a Co-Chairman of the Weirton Joint Study Committee, Inc., and Carl Valdeserri, a Vice-Presi-

[2]As will be discussed more fully below, the 70/80 and Rule-of-65 pensions and the severance benefits at issue, to the extent relevant to this litigation, were payable only in the event of the permanent shutdown of the Division or a portion thereof and consequent loss of employment.

dent of Weirton Steel Division and also a Co-Chairman of the Weirton Joint Study Committee, Inc. Subsequently, the district court denied Petitioner's motions for injunctive relief.

National Steel Corporation thereafter moved for summary judgment as to certain claims based upon the evidence presented at the injunction hearings, the pleadings, and the affidavits submitted by the parties. The well pleaded facts of the complaints, together with the uncontroverted evidence established at the preliminary injunction hearings, were considered by the district court in determining whether an issue of material fact was in dispute so as to preclude summary judgment. The district court granted summary judgment as to certain claims, which judgments were affirmed by the court of appeals.

The following description of events presents the counterstatement of the case by National Steel Corporation and the National Steel Corporation Retirement Program:

National Steel Corporation announced on March 2, 1982 that it would no longer make significant capital investment in its Division facilities and that those facilities would be "downsized" over a period of time with a resulting reduction in the level of employment to between 1,200 and 2,000 employees by the late 1980's, as compared with approximately 7,000 active employees in April, 1983. As an alternative, National's management indicated a willingness to find a buyer for the Division or to explore the possibility of an employee purchase of the facility. *Sutton* Appendix at 18a.

Members of management of the Division and the Union formed the Weirton Joint Study Committee, Inc. (hereinafter "Committee") to explore the possibilities for

an employee purchase of the facility. The Committee's Board of Directors comprised five representatives of Division management, twenty-one representatives of the Independent Steelworkers Union and three representatives of the Independent Guard Union. *Sutton* Appendix at 18a-19a. The union members of the Board represented the interests of their memberships; the management members of the Board represented the interests of non-union employees. The Committee raised funds and, through a competitive selection process, hired various experts as consultants, including pension experts, financial experts and legal experts, to advise and represent the Committee in its negotiations with National.[3] *Sutton* Appendix at 19a. The Committee as a whole guided the commercial aspects of the negotiations and structured the substance of the Employee Stock Ownership Plan.

In order to implement the sale, each union separately negotiated with National concerning the effects of the sale on its existing labor, pension and benefits agreements with National, and the results of those negotiations had to be ratified by vote of union members. *Sutton* Appendix at 20a.

The district court, based on uncontroverted credible evidence introduced at the hearings on motions for preliminary injunctions filed in the *Sutton* and *Brunner* actions, found that the Committee acted on the basis of independent expert advice in its dealings with National regarding the sale and that Petitioners had failed to raise a genuine issue of material fact as to its allegation that the Committee was either controlled by National or used by National

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[3]These experts included Lazard Freres & Company, McKinsey & Company, and the law firm of Willkie Farr and Gallagher.

as a sham to further National's self-interests.[4] *Sutton* Appendix at 28a.

After a year of negotiations between counsel for the Committee and representatives of National, an Agreement in Principle regarding the sale was reached March 11, 1983. The Agreement in Principle was subject to further negotiations toward a definitive Agreement of Sale. It was also contingent upon National's obtaining agreement from the Union to adopt certain clarifying amendments to the existing Union Pension Agreements regarding 70/80 and Rule-of-65 pension benefits, as well as to the existing severance pay provisions of the Union contracts. The Agreement in Principle required identical clarifying amendments to be made to the salaried pension plan and salaried severance pay policy applicable to National's non-union employees.

National would not agree to sell the Division if the sale could be interpreted to require it to pay the aforementioned pension and severance benefits which, by their own terms, were conditioned upon the occurrence of a permanent shutdown of the plant and resulting termination of

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[4]Because Petitioners' arguments herein, as well as below, depend heavily upon the assertion that the Committee was nothing more than an instrument under National's control, it is important to note that the contrary findings of the district court were based upon its review of the evidence presented by plaintiffs themselves on this issue at the preliminary injunction hearings. This finding was independently supported by the Office of the General Counsel for the National Labor Relations Board, which refused to issue unfair labor practice complaints based upon charges filed against both National and the Union, alleging that National unlawfully dominated the Union by reason of the inclusion of Division management representatives on the Committee and alleging further that the Union had relinquished its exclusive representative status under the National Labor Relations Act by participating on the Committee or by negotiating as Committee participants with respect to the terms of a sale. *See* Appendix A of this Brief.

employment. The cost of paying such contingent benefits would make the sale economically prohibitive for National. A sale in accordance with the other terms negotiated with the Committee would have been unacceptable to National if there remained any possibility that the sale of the Division as an ongoing operation would be interpreted as triggering eligibility for these costly contingent benefits.

The 70/80 and Rule-of-65 pension benefits are payable before normal retirement age upon the occurrence of specified contingencies resulting in a permanent loss of employment, e.g., at the time of a permanent shutdown of a plant or at the end of a period of layoff caused by a permanent shutdown, and include both (a) a regular pension benefit based on years of service and (b) a $400 monthly supplemental payment until age 62. *Sutton* Appendix at 30a-31a. Because of their contingent nature, they are not funded by periodic payments to the trust of the Plan, as are vested pension benefits.

The severance pay provisions are not part of the pension plan. They exist either as part of the collective bargaining agreements applicable to union employees or as a corporate severance policy applicable to non-union employees. Like the contingent pension benefits described above, eligibility for severance benefits is contingent upon a loss of employment caused by a permanent shutdown of the plant or job elimination. *Sutton* Appendix at 45a, 74a. Severance payments are not funded but must be paid from the corporate treasury.

Ultimately, therefore, as part of the negotiations resulting in the sale of the facility, National made the following agreements concerning pension and severance pay with the Committee (and, subsequently, with Weirton Steel Corporation) and with the Union:

1. National retained all responsibility for pension benefits accrued through April 30, 1983 by Weirton participants under National's pension plan. National was required to establish a new pension plan covering Weirton retirees and employees who formerly participated in National's pension plan and to segregate and place in a separate trust such pension plan assets as would properly be allocable to those retirees and employees, in accordance with the allocation formula of ERISA §4044, 29 U.S.C. §1344. No assets in the fund were to be returned to National. *Sutton* Appendix at 32a-33a.

2. The accrued benefits of all Division employees, even those who at the time of transfer of ownership would lack the requisite years of service under National's pension plan, were to be fully vested, *i.e.*, made non-forfeitable. Moreover, National agreed to continue to credit future service with the Weirton Steel Corporation for eligibility purposes under the retirement plan maintained by National for the former Division employees. *Sutton* Appendix at 4a. Thus, employees who had earned, for example, 25 years of service under the National plan prior to the sale and who earn an additional five years of service by continuing to work for the Weirton Steel Corporation may, at the end of such additional five years, elect to retire with a "30 year" pension benefit prior to normal retirement age. Upon such retirement, National's fund for Division employees would pay 25/30ths of the 30 year retirement benefit, computed on the basis of the employee's earnings and service while employed by National. The Weirton Steel Corporation Plan would pay the remaining 5/30ths of the pension benefit.

3. National agreed to a five year "safety net" provision for possible payment of 70/80 and Rule-of-65 retirement benefits. *Sutton* Appendix at 37a. Under this provision, if

Weirton Steel Corporation permanently shuts down the Weirton facility within five years and if its available corporate assets, together with its pension fund, are insufficient to pay the 70/80 and Rule-of-65 pension benefits provided under its own pension plan (*see* p. 9, *infra*), National Steel Corporation (or in certain circumstances, its parent corporation) would be obligated to pay 70/80 and Rule-of-65 retirement benefits to employees who are eligible as determined by their combined service with National and Weirton Steel Corporation. The amount of the regular pension component of the 70/80 or Rule-of-65 pension benefit would be calculated on the basis of earnings and service with National prior to the sale. However, National would pay the entire $400 monthly supplement. Benefits payable upon a shutdown of less than the entire plant during and after the five year period would be the sole responsibility of Weirton Steel Corporation, as would be such benefits payable upon a complete plant shutdown after the five year period.

In August, 1983, the Committee distributed to Division employees a "disclosure document" which provided a detailed summary of the terms of the sale, including the requirement that the pension and severance provisions be clarified by amendment to state that a sale would not be interpreted to constitute a permanent shutdown of the plant. On September 23, 1983 the membership of the Union voted overwhelmingly to ratify the clarifying amendments. Thereafter, National and the Union adopted such clarifying amendments to the Union pension agreements and Union severance provisions which stated, *inter alia*, that the sale of assets was not an event which would be interpreted to constitute a permanent shutdown of the plant or the absence of suitable long-term employment so as to make the sale an event which triggers any employee's

amendments which applied uniformly to all Division employees. In either case, the absence of a legal duty owed to the *Dhayer* Petitioners by their bargaining representatives affords no ground for their attempt to avoid the controlling affect of this Court's decision in *Robinson.*

Furthermore, the collective bargaining agreement provisions of which the plaintiffs complained in *Robinson* were the result of an "eleventh hour" package proposed by the employers—after a strike by the union had already begun—and were directly contrary to demands made by the union throughout the negotiations. The union received no separately identifiable *quid pro quo* for relinquishing these demands. 455 U.S. at 567. These circumstances in *Robinson* certainly are analagous to those elements of the present case which the Petitioners wrongly characterize as eleventh hour economic coercion by National. Therefore, their effort to distinguish *Robinson* on the basis of the "unique circumstances" surrounding the negotiations between National and the Committee must fail.

In short, the distinctions which Petitioners seek to draw are both legally insignificant and insufficient to remove the instant case from *Robinson's* reach. More importantly, Petitioners fundamentally misconstrue and distort the fiduciary standards imposed by ERISA when they argue that those standards must reach an employer's decision as to the level of benefits it will provide and the contingencies under which it will provide them. This Court has recognized a clear distinction between the duties of an employer acting *qua* employer in setting (or negotiating for) the terms of an employee benefits plan and an employer acting as a fiduciary in administering a plan in accordance with its terms. *See National Labor Relations Board v. Amax Coal Company,* 453 U.S. 322 (1981). Administration of a plan is not collective bargaining. *Id.* at

337 n. 21. Where an employer is a fiduciary by virtue of its designation as administrator of a plan, fiduciary duties attach only to its administration of the plan and plan assets—not to all other actions it takes regarding the plan. *See Chicago Board of Options Exchange vs. Connecticut General Life Insurance*, 713 F.2d 254 (7th Cir. 1983); *Schulist vs. Blue Cross of Iowa*, 717 F.2d 1127 (7th Cir. 1983); *UAW District 65 vs. Harper & Row, Inc.*, 576 F. Supp. 1468 (S.D.N.Y. 1983); *see also*, ERISA, 3(21)(a), 29 U.S.C. §1102(21)(a).

This is not to say that an employer is absolutely free to amend or modify a plan without attention to the requirements of ERISA. ERISA's vesting requirements and similar provisions act as legal constraints, as where an employer would attempt to cause a forfeiture of vested, accrued benefits. However, when a plan amendment does violate such specific requirements it is unlawful by reason of its failure to conform to a specific stricture of ERISA, not by reason of the employer's violation of its fiduciary duty as administrator of the plan. Indeed, an employer's fiduciary status is wholly irrelevant to the question of whether a violation has occurred in such circumstances.

In summary, therefore, Petitioners have failed to present any plausible, much less convincing, arguments in support of their contention that the courts below have misplaced their reliance on *Robinson*. The court of appeals broke no new legal ground in holding that fiduciary standards do not apply in the circumstances of the negotiated sale of a plant. Accordingly, certiorari should be denied.

C. THE COURT OF APPEALS CORRECTLY HELD THAT THE SALE DID NOT INVOLVE A PROHIBITED TRANSACTION UNDER ERISA.

Petitioners failed to convince either of the courts below that the challenged actions with respect to the con-

tingent pension and severance benefits constituted a prohibited transaction within the meaning of section 406(a) or (b) of ERISA, 29 U.S.C. §1106(a), (b). In order to bolster their inherently implausible reading of the Act, Petitioners submitted an affidavit by an actuary who suggests that it would be prudent for National to consider these potential contingent liabilities arising from a possible future plant shutdown as an "asset" of the pension fund.[5] On the strength of this affidavit, Petitioners have argued that a question of fact exists as to whether any attempt on National's part to relieve itself of liability for payment of such contingent benefits would be prohibited self-dealing with the assets of the plan.

Petitioners have thus urged the courts to adopt a definition of the term "assets" which is so radical that its adoption would give rise to enormous uncertainty and confusion. The court of appeals properly rejected such a strained and specious interpretation of the term "assets" as used in ERISA, stating that "the actuary's opinion is not proof that National's contingent liability is an asset of the plan within the meaning of ERISA." *Sutton* Appendix at 8a.

Petitioners have pointed to no evidence that Congress ever intended to give the term "assets" a tortuous or unusual meaning for the purposes of ERISA. In the absence of compelling evidence to the contrary, such terms should be given their usual and customary meaning. *Aaron v. Securities & Exchange Commission*, 446 U.S. 680 (1980).

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[5]In their brief to this Court, Petitioners in *Sutton* and *Dhayer* stated that the actuary in question, Daniel Kass, was with the firm of Towers, Perrin, Forster & Crosby (T.P.F&C), the same firm which had advised the Committee. Petitioners' Brief, p. 9. That statement was incorrect. Mr. Kass' affidavit, set forth at pages 121a-122a of the *Sutton* Appendix, indicates that he is associated with Kass, Germain & Company.

Furthermore, as the court of appeals found, in amending the pension plan and severance policy, National did not "cause the plan to engage in a transaction" as that term is used in section 406(a) of the Act, 29 U.S.C. §1106(a). There has been no evidence whatsoever that the pension plan was caused to engage in any sort of transaction in connection with the sale of the Weirton Division. The plan itself played no role in the sale transaction. It did not buy, sell, exchange, transfer, loan, guarantee, furnish or acquire anything, and, as the court of appeals stated, "[n]o funds held by the pension plan will be depleted or recouped by the company because of the agreement not to trigger the contingent benefits." *Sutton* Appendix at 8a. In short, section 406(a) is on its face totally inapplicable to the sale.

Petitioners' attempt to concoct an argument that a prohibited transaction has occurred is sheer bootstrapping. The plain language of the statute itself stands as an insurmountable barrier to Petitioners' theory. That theory was properly rejected by the courts below. It is not worthy of further consideration by this Court.

CONCLUSION

For all of the foregoing reasons, the Petitions for Writ of Certiorari in the *Brunner*, *Sutton* and *Dhayer* actions should be denied.

Respectfully submitted,

CARL H. HELLERSTEDT, JR.
(Counsel of Record)

JOSEPH MACK, III
BRIAN J. DOUGHERTY

THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, PA 15222

APPENDIX A

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

August 11, 1983

Re: Weirton Steel Div.,
National Steel
Corporation
Case No. 6-CA-16296

Independent
Steelworkers Union
(Weirton Steel Div.)
Case No. 6-CB-6012

Anthony P. Sgambatti II, Esq.
Michael Morley, Esq.
P.O. Box 849
Youngstown, Ohio 44501

Gentlemen:

Your appeal from the Regional Director's refusal to issue complaint in the above-captioned matter has been duly considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of July 12, 1983. After a thorough review of all the evidence disclosed during the Regional investigation and contentions raised on appeal, it was concluded that a violation of the National Labor Relations Act could not be established. Accordingly, further proceedings herein were deemed unwarranted.

Very truly yours,

William A. Lubbers
General Counsel

By /s/ MARY M. SHANKLIN
Mary M. Shanklin
Director, Office
of Appeals

cc: Director, Region 6
Mr. Richard Arango, 105 Arango St., Weirton, West Virginia 26062
Independent Steelworkers Union, 2971 W. St., West Virginia
Peter R. Rich, Esq., Bogard S. Robertson, 3147 W. St., Weirton, West Virginia 26062
Weirton Steel Div., National Steel Corp., 3 Springs Dr., Weirton, West Virginia 26062

NATIONAL LABOR RELATIONS BOARD

REGION 6

1502 William S. Moorhead Federal Building,
1000 Liberty Avenue

Pittsburgh, PA 15222

July 12, 1983

Re: Weirton Steel Div.,
National Steel
Corporation
Case No. 6-CA-16296

Independent
Steelworkers Union
(Weirton Steel Division)
Case No. 6-CB-6012

Anthony P. Sgambati, Esquire
P.O. Box 849
4th Floor Dollar Bank Building
Youngstown, Ohio 44501

Dear Mr. Sgambati:

The above-captioned cases alleging a violation of Section 8(a)(1) and (2) and Section 8(b)(1)(A) of the National Labor Relations Act, as amended, have been carefully investigated and considered.

As to the allegations that the Employer violated Section 8(a)(1) and (2) of the Act by the participation of management representatives on a joint study committee created to examine the feasibility of an employee stock ownership plan (ESOP), the investigation disclosed that the Joint Study Committee (JSC) consists of representatives of management at the Weirton Steel Division as well as representatives of the charged union and an independent guards'

union which separately represent employees at the facility. The management representatives on the JSC do not have voting control of committee actions inasmuch as they do not constitute a majority of committee members. Further, the investigation failed to establish that the management representatives on the JSC are representing the interests of National Steel Corporation rather than the interests of their fellow management employees at the Weirton Steel Division who would become the management employees of the new employee-owned facility should the ESOP plan be successful. Thus, there appears to be insuffient evidence to establish that the Employer has dominated or interfered with the administration of the Union in violation of Section 8(a)(2) of the Act.

With respect to the allegation that the Charged Union violated its duty of fair representation toward employees by agreeing to certain concessions with National Steel in an effort to make the ESOP plan feasible, the investigation disclosed no evidence that any decisions by the charged union relating to contractual concessions were made in an arbitrary fashion or in bad faith. It is noted that, for example, the Union negotiated a safety net for pension rights whereby National Steel Corporation would remain liable for pensions of retirees of the employee-owned facility should the facility cease operations within 5 years of the ESOP plan becoming implemented. The investigation further failed to disclose evidence that any of the compromises made by the Union in negotiations were not made in good faith.

With respect to the allegation that the Union could not legally negotiate with the proposed new entity concerning the working conditions of the future employees of the employee-owned facility due to a lack of representative status under Section 9(a) of the Act, the investigation dis-

closed that as the purpose of the ESOP is to guarantee continued employment for as many current employees as possible, and as the prospective employer is being created pursuant to a plan to retain all of the unit employees now employed in the Weirton Division, it is under an obligation to negotiate with the Union relating to the working conditions of the employees to be retained. *N.L.R.B.* v. *Burns International Security Services*, 406 U.S. 272, 294, 295 (1972). Under these circumstances, the Union does not violate Section 8(b)(1)(A) of the Act by negotiating with the prospective employer regarding the conditions to be enjoyed by employees once the ESOP goes into effect.

As to the allegation that the Union violated Section 8(b)(1)(A) of the Act because of a conflict of interest in that, should the ESOP plan be implemented, two members of the Board of Directors of the new entity will be appointed by the Union, it is noted that the two Union representatives will not constitute a majority or controlling interest on the Board of Directors. Further, in order to establish a violation of the Act in this regard, it must be shown that there is an actual, rather than potential, conflict of interest in having Union representatives serve on a corporate Board of Directors. No such actual conflict of interest has been demonstrated herein. It is further noted that all agreements arising out of the ESOP plan are subject to ratification by the unit employees prior to their implementation. Based on the current structure of the ESOP plan and the evidence adduced during the investigation, it does not appear that the presence of the two Union representatives on the Board of Directors constitutes a violation of the Act.

The charge further alleges that the Union violated Section 8(b)(1)(A) of the Act by its failure to process grievances. The investigation disclosed that although two Union stew-

ards may have informed an employee that grievances would not be processed from a certain point in time, nevertheless grievances have been accepted and processed by the Union without interruption. The investigation disclosed no evidence that the Union at any time refused to accept or process grievances filed by its members. Assuming, *arguendo*, that the statements attributed to the two stewards were in fact made to the employee, this misinformation has been effectively corrected by the action of the Union in continuing to process grievances in an appropriate manner. Accordingly, there is insufficient evidence to warrant proceeding on this allegation. In view of the foregoing, further proceedings do not appear warranted, and I am refusing to issue Complaint in this matter.

If you file an appeal, please complete the notice forms enclosed with the attached letter and send one copy of the form to each of the other parties whose names and addresses are listed. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal to me within the time stated above.

Very truly yours,

/s/ GERALD KOBELL

Gerald Kobell
Regional Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

cs

cc: William A. Lubbers, General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. Richard Arango
105 Arango Street
Weirton, WV 26062

Independent Steelworkers Union
2971 West Street
Weirton, WV 26062

Peter R. Rich, Esquire
Bogarad & Robertson
3147 West Street
Weirton, WV 26062

Weirton Steel Division,
National Steel Corporation
3 Springs Drive
Weirton, WV 26062